Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, PETITIONER

v.

GLENN CARPENTER, IN HIS CAPACITY AS MANAGER OF THE SALT LAKE FIELD OFFICE OF THE BUREAU OF LAND MANAGEMENT, ET AL., AND SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tenth Circuit affirmed the Utah district court's ruling upholding the Bureau of Land Management's non-emergency restrictions of mountain biking, off-highway vehicle and dispersed camping uses, even though such uses were authorized by BLM's governing land use plans and BLM's restrictions were implemented without first amending such land use plans according to section 202, 43 U.S.C. § 1712, of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*

FLPMA section 302(a), 43 U.S.C. § 1732(a), requires that agency management actions conform to land use plans unless and until the plans are amended in accordance with FLPMA section 202. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004). FLPMA section 202 mandates that land use plans shall be amended utilizing public participation and comment in a systematic interdisciplinary process. 43 U.S.C. §§ 1712(a), 1712(c)(2)&(9), 1712(f); 43 C.F.R. §§ 1610.5-3(c), 1610.5-5.

BLM's non-emergency management actions herein clearly failed to conform to governing land use plan standards. Petitioner sued contending that BLM's actions violated section 302(a)'s management conformity mandate and that BLM's de facto amendment of the land use plans denied Petitioner of its right to participate and comment in the section 202 public, systematic interdisciplinary, amendment process mandated by Congress.

The Tenth Circuit upheld BLM's management restrictions, ruling that FLPMA section 302(b)'s "prevent unnecessary or undue degradation" provision, 43 U.S.C. § 1732(b), provides an exemption to FLPMA section 202's public participation planning mandate and to FLPMA section 302(a)'s management conformity mandate. The

Tenth Circuit opinion, thus, eviscerates Congress' public participation and management conformity mandates, and directly violates *Norton*, presenting an important question of federal law that has not been, but should be settled by this Court.

One question is presented:

Whether, in the absence of an emergency, BLM may apply FLPMA section 302(b)'s "prevent unnecessary or undue degradation" provision to eviscerate FLPMA section 202's public participation mandate and FLPMA section 302(a)'s management conformance mandate.

PARTIES TO THE PROCEEDING

Petitioner: Utah Shared Access Alliance, a nonprofit advocacy group

Respondents: Glenn Carpenter, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land management; Maggie Wyatt, in her capacity as manager of the Moab Field Office of the Bureau of Land Management; Sherwin Sandberg, in his capacity as the manager of the Monticello Field Office of the Bureau of Land Management; Sally Wisely, in her capacity as Utah State Director of the Bureau of Land Management; Gale A. Norton, in her capacity as Secretary of the Interior; Kathleen Clarke, in her capacity as Director of the Bureau of Land Management*

Intervenor-Respondents: Southern Utah Wilderness Alliance, a nonprofit advocacy group; The Wilderness Society, a nonprofit advocacy group; Great Old Broads for Wilderness, a nonprofit advocacy group; Wildlands, CPR, a nonprofit advocacy group

Rule 29.6

Utah Shared Access Alliance is a 501(c)(3) public advocacy group, does not issue stock, and does not have shareholders. Utah Shared Access Alliance has no parent, subsidiaries or affiliates.

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*Since this case began: Sandra Meyers has replaced Sherwin Sandberg as the current manager of the Monticello Field Office. Selma Sierra has replaced Sally Wisely as Utah State Director of the Bureau of Land Management; Dirk Kempthorne has replaced Gale A. Norton as Secretary of Interior

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OPINIONS BELOW

The opinion of the Tenth Circuit Court is reported at *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006). The district court's August 28, 2003 opinion is not reported. The district court's December 9, 2004 opinion is reported at 348 F. Supp. 2d 1265.

JURISDICTION

The Tenth Circuit filed its decision on September 19, 2006, and entered an order denying Petitioner's Petition for Rehearing with Suggestion for Hearing *En Banc* on November 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1331, which authorizes the Court to hear actions arising under the Constitution, laws and treaties of the United States (in this case the Federal Land Management and Policy Act, 43 U.S.C. § 1701 *et seq.*), and, the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, which provides jurisdiction to review final agency actions.

RELEVANT PROVISIONS INVOLVED

The following FLPMA sections are set out verbatim in the appendix: FLPMA section 103(d) [43 U.S.C. § 1702(d)], FLPMA section 202 [43 U.S.C. § 1712], FLPMA section 302(a) [43 U.S.C. § 1732(a)], FLPMA section 309(e) [43 U.S.C. § 1739(e)]. All of these sections concern FLPMA's public participation mandate. Additionally, FLPMA section 302(a) contains FLPMA's management conformity mandate. Also set out verbatim in the appendix is FLPMA section 302(b)

[43 U.S.C. § 1732(b)], which contains the "prevent unnecessary or undue degradation" clause.

STATEMENT

1. FLPMA repealed numerous public land laws considered obsolete and modified thousands more,[1] providing the Secretary of Interior, and, thereby, the Bureau of Land Management (BLM), with a single comprehensive management directive. FLPMA mandates that BLM lands be managed for multiple use and sustained yield and FLPMA requires BLM to provide a balance of uses. 43 U.S.C. § 1701(a)(7),(8), & (12).

To assist BLM in fulfilling this balancing obligation, FLPMA requires BLM to prepare and maintain an "inventory of all public lands and their resource and other values," 43 U.S.C. § 1712(a), and to prepare land use plans, 43 U.S.C. § 1712, which BLM calls resource management plans (RMPs). In developing or amending RMPs, BLM must observe the principles of multiple use and sustained yield, 43 U.S.C. § 1712(c)(1), use a "systematic interdisciplinary approach," 43 U.S.C. § 1712(c)(2), and consider environmental impacts, 43 C.F.R. § 1610.2(a).

Importantly, Congress mandated that BLM must "give Federal, State, and local governments and the public adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands." FLPMA section 202(f), 43 U.S.C. § 1712(f). To emphasize its insistence upon public participation,

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[1] H.Rep. No. 94-1163, at 1 (1976); Reprinted in 1976 U.S.C. 6175.

Congress reiterated its mandate numerous times throughout FLPMA.[2]

Congress further mandated that BLM's management of the public lands must conform to the standards set forth in its RMPs. FLPMA section 302(a), 43 U.S.C. § 1732(a), mandates that BLM, "shall manage the public lands under principles of multiple use and sustained yield, *in accordance with the land use plans developed ... under section 202 of this Act ...*" emphasis added.

2. BLM has adopted numerous RMPs for its Utah lands. These land use plans have designated extensive lands as "open"[3] to mountain bike, off-highway vehicle (OHV), and motor-assisted dispersed camping uses.[4] Such are the cases with the Box Elder RMP, adopted April 1986, which governs BLM lands in Box Elder County, and the Grand RMP, adopted June 1985, which governs BLM lands in Grand County and a portion of San Juan County. T0839, T1471.[5]

Soon after the Grand RMP was adopted in 1986 a significant increase in mountain biking, camping and OHV recreation occurred in the Grand RMP area. This increase continued into the 1990's presenting BLM with legitimate management challenges.[6] However, BLM regularly responded to these challenges by

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[2] These sections are quoted at page 10-12.

[3] "Open area means an area where all types of [off road] vehicle use is permitted at all times, anywhere in the area ..." 43 C.F.R. § 8340.0-5(f).

[4] Dispersed camping is camping unrestricted to designated sites or campgrounds.

[5] Appendix to the Petition references as _a. Tenth Circuit appendix references as T_.

[6] Record numbers of visitors were expected in the 1993 tourism season. T1513.

implementing RMP-authorized actions[7] and by plan amendments/environmental assessments (EAs)[8] under FLPMA section 202. By 1996 the increase in recreation was stabilizing. BLM's 2001 amendment/EA to the Colorado Riverway Recreation Plan amendment stated, "Overall visitor use in the Moab area has been relatively stable for the past five years, but appears to be shifting somewhat from non-motorized to motorized use." T1656.

BLM's Box Elder County lands, located chiefly on the extremely lonely desert west of the Great Salt Lake, have never been subject to a recreational boom like that in the Grand RMP area, which surrounds Moab, Utah. There are no cities or towns west of the Great Salt Lake. However, as in Grand County, BLM has restricted huge areas of lands from OHV use contrary to RMP "open" standards.

3. In 1999 BLM adopted a statewide policy goal to change RMP categories from "open" to "limited to designated roads and trails" for all public lands in Utah except specifically designated "open" areas, such as sand dune areas. T1245, T1722. BLM determined to fast-track changes to mountain biking, camping and OHV management standards, thereby evading FLPMA's public participation, "systematic interdisciplinary approach," and environmental analysis requirements. To evade FLPMA sections 202 and 302(a), BLM construed its authority under FLPMA

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[7] 1987 "Off-Road Vehicle Implementation Plan." T1446.

[8] Utah's Colorado Riverway Recreation Area Management Plan (1992), itself amended by Amendment 1 in May, 2001. T1581. Mill Creek Canyon Management Plan (Feb. 2001)(T1551), incorporating four EAs from 1996, 1999 and 2000 resulting in findings of no significant impact and also a Document of NEPA Adequacy. T1556-57, T1568.

section 302(b)'s "prevent unnecessary and undue degradation" clause to override FLPMA sections 202 and 302(a). T0374.

4. This petition concerns summary restrictions issued by BLM to implement its statewide goal. In 1999 and 2000 BLM issued orders (88a, 90a) restricting 550,000 "open" acres in Box Elder County to "limited to existing routes" and "limited to designated routes" standards recommended by an ad hoc advisory group. T0811. 90a. In 2001 BLM restricted a quarter million "open" acres in Grand County by issuing two orders (94a, 98a) eliminating mountain bike and OHV uses, except on existing routes, and eliminating related dispersed camping.

The 1999 and 2000 Box Elder County orders and the two 2001 Grand County orders each cited as authority 43 C.F.R. § 8341.2 and/or 43 C.F.R. § 8364.1. 88a(90a), 90a(93a), 94a(98a), 98a(104a). 43 C.F.R. § 8341.2 provides:

> Notwithstanding the consultative provisions in Sec. 8342.2(a), where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources, the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence.

43 C.F.R. § 8341.2 applies only to OHVs. In contrast, BLM relied on 43 C.F.R. § 8364.1 to restrict mountain bike and camping uses, as well as OHV uses. 43 C.F.R. § 8364.1 authorizes administrators to "close or restrict use of designated public lands" in order to "protect persons, property, and public lands and resources." Subpart (b)(3) of this regulation requires that each order shall "[s]pecify the period of time during which the closure or restriction shall apply."

5. Petitioner filed this action on October 21, 2001, challenging, *inter alia*, the two 2001 Grand County orders and the 1999 and 2000 Box Elder County orders. The Grand County orders made no claim of emergency. Though announced as emergency actions, the two Box Elder County orders were obviously not emergency in nature since they were issued to implement OHV restrictions recommended by an ad hoc advisory group, never chartered under the Federal Advisory Committee Act, 5 U.S.C. App. 2 § 1 *et seq.* 91a.

After Petitioner filed its initial opening brief with the district court, BLM on April 24, 2003 revoked its 1999 and 2000 Box Elder County orders, and simultaneously issued a new order (104a) that restricted 189,000 acres of "open" lands in Box Elder County to "limited to designated routes" and closed over a hundred miles of non-designated existing roads. T0588-603. In the new order (2003 Box Elder Order), BLM relied solely on 43 C.F.R. § 8341.2 and did not assert emergency authority as it had in the 1999 and 2000 restrictions. To support the 2003 Box Elder Order BLM documented increasing non-emergency OHV impacts within the 189,000 acre areas. Petitioner, granted leave to file a supplemental complaint (64a),

(any footnotes trail end of each document)

No. 05-4009

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation,
Plaintiff-Appellant,

v.

GLENN CARPENTER, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land Management; MAGGIE WYATT, in her capacity as manager of the Moab Field Office of the Bureau of Land Management; SHERWIN SANDBERG, in his capacity as manager of the Monticello Field Office of the Bureau of Land Management; JERRY MEREDITH, in his capacity as manager of the Richfield Field Office of the Bureau of Land Management; SALLY WISELY, in her capacity as Utah State Director of the Bureau of Land Management; GALE A. NORTON, in her capacity as Secretary of the Department of Interior; BUREAU OF LAND MANAGEMENT; KATHLEEN CLARKE, in her capacity as director of the Bureau of Land Management, Defendants-Appellees,

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation; THE WILDERNESS SOCIETY; WILDLANDS CPR, a non-profit corporation; GREAT OLD BROADS FOR WILDERNESS, a non-profit corporation; REDROCK FORESTS, a Utah non-profit corporation,
Defendants-Intervenors-Appellees.

September 19, 2006, Filed

COUNSEL: Paul W. Mortensen, Hanks & Mortensen, P.C., Salt Lake City, Utah, appearing for the Plaintiff-Appellant.

Jeffrey E. Nelson, Assistant United States Attorney (Paul M. Warner, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Utah, Salt Lake City, Utah, appearing for Defendants-Appellees.

Eric G. Biber, Earthjustice, Denver, Colorado (James S. Angell, Earthjustice, Denver, Colorado; Stephen H.M. Bloch, and Heidi J. McIntosh, Southern Utah Wilderness Alliance, Salt Lake City, Utah, with him on the brief), appearing for the Defendants-Intervenors-Appellees.

JUDGES: Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and O'BRIEN, Circuit Judge.

OPINION BY: TACHA

OPINION: TACHA, Chief Circuit Judge.

Plaintiff-Appellant Utah Shared Access Alliance ("USA-ALL") is Utah's largest motorized access advocacy organization. Its members use motorized vehicles, including off-highway or off-road vehicles ("ORVs"), to access lands throughout Utah that are managed by the Bureau of Land Management ("BLM"). After the BLM imposed several restrictions on ORV use in certain parts of the state, USA-ALL filed this

lawsuit in the District of Utah under the Administrative Procedure Act ("APA"), alleging violations of the Federal Land Policy and Management Act ("FLPMA"), the National Environmental Policy Act ("NEPA"), the Federal Advisory Committee Act ("FACA"), and the National Defense Authorization Act ("NDAA"), as well as regulations promulgated pursuant to those statutes. The District Court concluded that the BLM had not violated FLPMA, NEPA, or FACA, and that USA-ALL did not have standing to bring its claim under the NDAA. The court therefore entered judgment in favor of the BLM and dismissed the action under the NDAA. USA-ALL now timely appeals the District Court's ruling with respect to FLPMA, NEPA, the NDAA, and certain regulations. We take jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

I. STATUTORY FRAMEWORK

A. Federal Land Policy and Management Act

Nearly one-half of Utah is federal land managed by the BLM, which is an agency within the Department of Interior. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004) ("*SUWA*"). FLPMA, codified at 43 U.S.C. § 1701 et seq., creates a "versatile framework" for governing the BLM's management of these lands. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737-38 (10th Cir. 1982). The statute directs the BLM to manage public lands "under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a); *see also* 43 U.S.C. § 1701(a)(8) (listing purposes and values that should be considered in the management of public lands). "'Multiple use management' is a deceptively simple

term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . ." *SUWA*, 542 U.S. at 58 (citing 43 U.S.C. § 1702(c)). These uses include, but are not limited to, "recreation range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *Id.* The phrase "sustained yield" refers to the BLM's duty "to control depleting uses over time, so as to ensure a high level of valuable uses in the future." *Id.* (citing 43 U.S.C. § 1702(h)).

To assist in the management of public lands, FLPMA requires that the BLM "develop, maintain, and, when appropriate, revise land use plans." 43 U.S.C. § 1712(a). These land use plans, which the BLM regulations denote "resource management plans" ("RMPs"), *see* 43 C.F.R. § 1601.0-5(n) (2005), project both the present and future use of the land. 43 U.S.C. § 1701(a)(2). Proposed RMPs are subject to a mandatory period of public notice and comment, *see* 43 C.F.R. § 1610.2, and, once adopted, will "guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. § 1601.0-2.

FLPMA prohibits the BLM from taking actions inconsistent with the provisions of RMPs. *See SUWA*, 542 U.S. at 69; 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands . . . in accordance with the land use plans developed by him . . . ."); 43 C.F.R. § 1610.5-3 ("All future resource management authorizations and actions . . . shall conform to the approved plan."). When needed, however, these plans may be amended. 43 C.F.R. § 1610.5-5. To do so, the BLM must prepare an

environmental assessment or an environmental impact statement, *see id.*, and submit the proposed amendment to public notice and comment in the same way as when the plan was originally being prepared. 43 C.F.R. § 1610.2.

In any event, RMPs must further the purpose of FLPMA, which is to ensure that:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). Further underscoring the BLM's duty to protect the environment is the statutory requirement that "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b).

B. Executive Orders and Federal Regulations Pertaining to ORV Use

ORV use represents one of the multiple uses that the BLM provides for and must balance in managing the public lands. In response to increased ORV use on these lands, in 1972 President Nixon issued an executive order for the purpose of "establish[ing]

policies and provid[ing] procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands." Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972). The stated reason for the order was to further the purpose and policy of NEPA; it established criteria by which federal agencies were to develop regulations and administrative instructions for the designation of areas and trails on which ORVs would be permitted. *Id.* § 3. It also required agencies to "monitor the effects" of ORV use on the public lands and "[o]n the basis of the information gathered, they shall from time to time amend or rescind designations of areas or other actions taken pursuant to this order as necessary to further the [NEPA]." *Id.* § 8.

President Carter, in 1977, issued Executive Order No. 11989, which amended Executive Order 11644 and strengthened it considerably. *See* Exec. Order 11989, 42 Fed. Reg. 26959 (May 24, 1977). The amended order provides that notwithstanding the BLM's designations of public land use under the applicable RMP, the BLM "shall . . . immediately close" any area or route to ORVs whenever it determines that ORV use "will cause or is causing considerable adverse effects" to wildlife, wildlife habitat, and other natural resources. *See id.* § 2 (amending Exec. Order 11644, § 9(a)). Under the order, the closure must remain in place until the adverse effects have been eliminated. *Id.*

The Department of Interior has adopted regulations to implement the Nixon and Carter Executive Orders, FLPMA, and other federal statutes. *See* 43 C.F.R. §

8340.0-1 et seq. Under 43 C.F.R. § 8342.1, all public lands must be designated as open, limited, or closed to off-road vehicles. *See* 43 C.F.R. § 8342.1. The designations must be made to minimize conflicts among the different users of the lands (i.e., hikers, ORV users, and birdwatchers). *Id.* In addition, care must be taken to avoid damage to natural resources and to prevent impairment of wilderness suitability. *Id.* The initial designation of areas as open, limited, or closed to ORVs is accomplished through the resource management planning process, and it must involve public participation and consideration of all viewpoints. 43 C.F.R. § 8342.2(a).

Short of promulgating or amending an RMP, the resource management planning process does not speak to the manner in which an ORV designation may be changed. As such, and in order to address Executive Order 11989, the BLM promulgated a regulation that requires the agency to close areas to ORV use, without resort to the route-designation process undertaken when promulgating or amending an RMP, when the BLM determines that ORVs "are causing or will cause considerable adverse effects" to "soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources." 43 C.F.R. § 8341.2(a). Notably, such closures are nondiscretionary: the BLM "*shall immediately close* the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence." *Id.* (emphasis added). "This provision creates a separate duty to close without regard to the designation process; it does not automatically become

inoperative once the Secretary exercises his discretion to designate the land." *Sierra Club v. Clark*, 756 F.2d 686, 690 (9th Cir. 1985).

The BLM's authority to close or restrict the use of public lands notwithstanding the provisions of the governing RMP is not limited to 43 C.F.R. § 8341.2(a). It is also permitted to do so in order "to protect persons, property, and public lands and resources." 43 C.F.R. § 8364.1. An order closing or restricting the use of public lands under this authority must identify the lands that are closed to entry or restricted as to use; specify the uses that are restricted; specify the period of time during which the closure or restriction applies; identify any persons exempt from the closure or restriction; include a statement of the reasons for the closure; and be posted and published as provided in the regulation. 43 C.F.R. § 8364.1(b), (c).

C. National Environmental Protection Act

NEPA, 42 U.S.C. § 4321 et seq., was enacted in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, [and] . . . the critical importance of restoring and maintaining environmental quality to the overall welfare . . . of man." 42 U.S.C. § 4331. NEPA "prescribes the necessary process by which federal agencies must take a hard look at the environmental consequences of the proposed courses of action." *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (internal quotations omitted). At bottom, NEPA "insure[s] a fully informed and well-considered decision," *see Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435

U.S. 519, 558, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978), especially when proposed activity may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Accordingly, NEPA requires all agencies that propose a "major federal action" that significantly affects the quality of the environment to prepare an environmental impact statement ("EIS") that describes the "environmental impact of the action; unavoidable adverse environmental effects; alternatives to the action; relationship between the short-term uses and long-term productivity of the affected environment; and irretrievable and irreversible commitments of resources should the action be implemented." *Catron County Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (citing 42 U.S.C. § 4332(2)(C)(i)-(v)). If the impact of the major federal action on the environment is uncertain, the agency must prepare an environmental assessment ("EA") to determine whether the impact will be significant such that an EIS is required. *Id.* (citing 42 U.S.C. § 4332(2)(E)). An EA and/or an EIS is also required when an RMP is to be amended. *See* 43 C.F.R. § 1610.5-5. Notwithstanding these mandates, regulations provide for "emergency" exceptions:

> Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the

> immediate impacts of the emergency. Other actions remain subject to NEPA review.

40 C.F.R. § 1506.11. In this way, agencies must comply with NEPA's requirements "to the fullest extent possible." 42 U.S.C. § 4332.

D. National Defense Authorization Act

The NDAA is enacted each fiscal year to specify the budget needs for the Department of Defense. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). The NDAA authorizes appropriations for Department of Defense military activities, including military construction and defense activities for the Department of Energy. *Id.*

On October 5, 1999, Congress enacted § 2815 of the NDAA, which affected Utah's public lands "adjacent or near to the Utah Test and Training Range and Dugway Proving Grounds or beneath Military Operating Areas, Restricted Areas, and airspace that make up the Utah Test and Training Range." NDAA § 2815(a), 113 Stat. 512, 852 (1999). The NDAA provided in § 2815(d) that "the Secretary of Interior may not proceed with any amendment of any individual resource management plan" until the Secretary of Defense submits a study to Congress evaluating the impact of any proposed changes to land management plans upon military training, testing, and operational readiness. NDAA § 2815(d), 113 Stat. 512, 852 (1999).

II. BACKGROUND

At issue is whether the BLM acted within its authority when it imposed restrictions on ORV use in Box Elder County and Grand County, Utah, from 1999 through 2003.

A. Box Elder County

Pursuant to FLPMA, the BLM has adopted RMPs for its Utah lands. The Box Elder RMP was adopted in 1986 and designates the vast majority of land as open to ORV use. In 1999, however, the BLM published a Notice of Closure of Public Lands ("1999 Box Elder Order"), which closed land that had been previously designated as open. The closure was ordered seasonally, from January through April, and the authority for the closure was listed as 43 C.F.R. §§ 8341.2 and 8364.1. *See* 64 Fed. Reg. 22639-02. The order reads as follows:

> Notice is hereby given that effective immediately, the public lands within Broad Hollow Unit, Kilgore Basin Unit, Meadows Unit . . . are seasonally closed from January 1 to April 30 to all motorized vehicle use. The purpose of this closure is to protect wildlife, including critical deer and sage grouse habitat. Exemptions to this closure will apply to administrative personnel of the Bureau of Land Management, BLM authorized permittees and Law Enforcement Personnel. Other exemptions to this closure order may be made on a case by case basis by the authorized officer. This seasonal closure will remain in effect until further notice.
>
> . . . .

> The authority for this closure is 43 C.F.R. § 8341.2 and 43 C.F.R. § 8364.1.

Id.

In 2000, the BLM published another closure order ("2000 Box Elder Order"), which temporarily closed selected lands to ORV use regardless of the season. *See* 65 Fed. Reg. 16410-01. Specifically, the order stated:

> Notice is hereby given that effective immediately, selected public lands administered by the Bureau of Land Management (BLM), Salt Lake Field Office, within western Box Elder County are closed to off road vehicle (ORV) (also commonly referred to as off highway vehicle--OHV) use on an interim emergency basis. This action will allow BLM to address concerns related to unrestricted cross country travel in the specific places where we now have resource damage. The purpose of this closure is to protect wildlife, wildlife habitat, rangeland resources, soil, vegetation, cultural resources, historical resources, and other resources from ongoing and imminent adverse impacts from ORV use. . . . This emergency closure will remain in effect until BLM completes a land use plan amendment for OHV management.

Id. Like the 1999 Box Elder Order, the 2000 Box Elder Order cited 43 C.F.R. §§ 8341.2 and 8364.1 as authorizing the closure.

In 2003, after USA-ALL filed this action, the BLM revoked both the 1999 and 2000 Box Elder Orders and

simultaneously issued a new order. That order ("2003 Box Elder Order") stated that in five areas of the county ORVs may only be used on designated routes. The remaining public lands were to be managed according to the 1986 Box Elder RMP. The 2003 Box Elder Order provided:

> Notice is hereby given that effective immediately, the Bureau of Land Management (BLM), Salt Lake Field Office, revokes the seasonal Notice of Closure of Public Lands published on April 27, 1999 (64 FR 22639 (1999)) and the Notice of Closure of Public Lands published on March 28, 2000 (65 FR 16410 (2000)). Notice is hereby given that effective immediately, ORV use in the following five areas of Box Elder County is limited to designated routes: Devils Playground (9838 acres), Grouse Creek Mountains (52493 acres), Hogup Mountains (51698 acres), Pilot Mountains (62654 acres), and Wildcat Hills (12640 acres). The remaining public lands in Box Elder County will be managed according to the Box Elder Resource Management Plan.

68 Fed. Reg. 20167-02.

Citing only 43 C.F.R. § 8341.2 as the authority for the closure order, the 2003 Box Elder Order further provided that "[t]his limitation will remain in effect until the considerable adverse effects giving rise to this limitation are eliminated and measures are implemented to prevent recurrence of these adverse effects." *Id.*

B. Grand County

As with Box Elder County, land use in Grand County is also managed by an RMP adopted in the mid-1980s. In January 2001, the BLM published two notices related to ORV use. In the first notice ("Grand County ORV Restrictions"), ORV use in five areas was to be limited to existing roads and trails only. The notice cited FLPMA, Executive Orders 11644 and 11989, and 43 C.F.R. §§ 8341.2 and 8364.1 as its authority, and stated:

> This notice places restrictions on travel by off-road vehicles (ORVs) and mountain bikes on specific public land administered by the BLM Moab Field Office.[1] These actions are necessary to halt ongoing impacts and prevent future degradation of resource values. They are being implemented on an interim basis to protect resource values and public safety, pending revision of the Resource Management Plan (RMP) for the area administered by the BLM Moab Field Office.

66 Fed. Reg. 6659-01. The second notice ("Grand County Camping Restrictions"), which was published in order to support implementation of the Grand County ORV Restrictions, provided that camping involving vehicles would be limited to developed campgrounds and designated campsites. 66 Fed. Reg. 6658-01. Again, the BLM cited 43 C.F.R. § 8364.1 as its authority for the notice.

C. Procedural History

On October 17, 2001, USA-ALL filed this suit in the

District of Utah, contesting implementation of the 1999 and 2000 Box Elder Orders and the two Grand County restrictions under FLPMA, NEPA, FACA,[2] and the NDAA. USA-ALL asked the District Court to set aside the orders and restrictions under the APA. *See* 5 U.S.C. § 706(2). Southern Utah Wilderness Alliance, The Wilderness Society, Great Old Broads for Wilderness, and Wildlands CPR were permitted to intervene and defend the BLM's action. Thereafter, the BLM revoked the two Box Elder Orders and supplanted them with the 2003 Box Elder Order. Accordingly, the BLM argued in its answer to USA-ALL's complaint that the 2003 Box Elder Order mooted any argument related to the 1999 and 2000 Box Elder Orders. The BLM also sought to have the complaint dismissed for failure to state a claim as to the remaining orders. After extensive briefing and oral argument, the District Court agreed with the BLM on both issues, and in two memorandum dispositions dismissed with prejudice all of USA-ALL's causes of action. This appeal followed.

III. DISCUSSION

A. Standard of Review

Because none of the statutory or regulatory provisions in question provide for a private cause of action, the judicial review provisions of the APA govern this suit. *See* 5 U.S.C. § 702; *Colo. Envtl. Coal. v. Walker*, 353 F.3d 1221, 1234-35 (10th Cir. 2004). Under the APA, a reviewing court may set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 779-80 (10th Cir. 2006). "[T]he

essential function of judicial review [of agency action] is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). Only the second and third inquiries will be undertaken in this appeal.[3]

To determine whether the agency complied with prescribed procedures, we must review the administrative record and applicable law. *Id.* To determine whether the agency's decision was arbitrary or capricious, we must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.* (footnote omitted). This standard also means that there must be a reasoned basis for the agency's action, and it must be supported by "substantial evidence." *Id.* "Evidence is substantial in the APA sense if it is enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact." *Id.* (internal quotation marks omitted). Finally, action will be deemed "arbitrary or capricious" if the explanation for the action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

B. The 1999 and 2000 Box Elder Orders are Moot.

Reviewing de novo, *see Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005), we agree with the District Court that USA-ALL's arguments relating to the 1999 and 2000 Box Elder Orders are moot. "Mootness is a threshold issue because the

existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996). Federal courts may adjudicate only actual controversies; as such a claim or appeal should be dismissed as moot when the controversy ceases to exist. *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002). Because the BLM revoked the 1999 and 2000 orders, any controversy associated with these orders has been nullified.

Nevertheless, USA-ALL argues that its appeal falls within an exception to the mootness doctrine because the BLM's actions are "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982). This exception applies "when: (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Disability Law Ctr.*, 428 F.3d at 996 (quotations and alterations omitted). There is no reasonable expectation that the BLM will re-issue the 1999 and 2000 Box Elder Orders because they have been superceded by the 2003 Box Elder Order. *See Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997) (superceding agency opinion moots original opinion). Moreover, the 1999 and 2000 Box Elder Orders will not evade review because USA-ALL makes the same arguments with respect to those orders as it does with respect to the 2003 Box Elder Order, which this Court reviews in Part III.C-E. *See id.* (when superceding agency opinion is capable of review, exception to the mootness doctrine does not apply).

Accordingly, the portion of this appeal relating to the 1999 and 2000 Box Elder Orders is dismissed as moot.

C. The BLM Complied with Procedures Mandated by FLPMA and its Action is Supported by Substantial Evidence.

1. *The Restrictions Are Not "De Facto Amendments."*

USA-ALL contends that the 2003 Box Elder Order and the two Grand County restrictions must be nullified because they are "de facto amendments" to the Box Elder and Grand County RMPs that were issued without public notice and participation and without the BLM having first conducted an EA as required by FLPMA. We disagree.

Although there is some support outside this jurisdiction for an argument relating to "de facto amendments," the cases of which this Court is aware have little--if any--bearing on the facts presented by this appeal. *See, e.g., House v. U.S. Forest Serv.*, 974 F. Supp. 1022 (E.D. Ky. 1997) (proposed timber sale approved on the basis of three policies that constituted "significant" changes to land use plan requires same public comment as land use plan itself); *Or. Natural Res. Council Fund v. Forsgren*, 252 F. Supp. 2d 1088 (D. Ore. 2003) (narrower definition of lynx habitat which led to reduction in such habitat is "significant" change to land use plan and requires public comment and preparation of EIS). This Court is not aware of any authority indicating that a closure order promulgated pursuant to 43 C.F.R. §§ 8341.2 and 8364.1 constitutes a "de facto" amendment to an RMP, thus triggering compliance with FLPMA's public participation and EA requirements. To the

contrary, the Ninth Circuit has specifically held that "[n]othing in [§ 8364.1] or the authorizing statutory sections requires public hearings for temporary closures" to vehicular use--thereby foreclosing any argument that temporary ORV closures are essentially RMP amendments. *Humboldt County v. United States*, 684 F.2d 1276, 1283 (9th Cir. 1982).

Indeed, courts have consistently emphasized the distinction between the initial ORV-route-designation process reflected in an RMP--which is subject to public comment and requires the promulgation of an EA--and closures of those designated routes authorized under regulations promulgated pursuant to FLPMA, NEPA, and other statutes. For example, the Central District of California noted that:

> The regulations took into account the amendments to E.O. 11,684 effected E.O. 11,989, 3 C.F.R. 120 (1978). *See* 43 C.F.R. s 8341.2. E.O. 11,989, among other things, amended E.O. 11,644 so as to require closure of ORV areas and trails whenever an agency finds that ORV use will cause or is causing "considerable adverse effects." *This closure standard is to be distinguished from the initial designation criteria set forth in E.O. 11,644 and mirrored in* 43 C.F.R. § 8342.1.

Am. Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 796 n.14 (C.D. Cal. 1982) (emphasis added); *see also Sierra Club*, 756 F.2d at 690 (stating that 43 C.F.R. § 8341.2 "creates a separate duty to close without regard to the designation process; it does not automatically become inoperative once the Secretary exercises his discretion

to designate the land."); *Am. Sand Ass'n v. U.S. Dept. of Interior*, 268 F. Supp. 2d 1250, 1255 (S.D. Cal. 2003) (closure order under 43 C.F.R. §§ 8341.2 and 8364.1 done in accordance with FLPMA).

Moreover, this exemption of OHV travel restrictions from the resource management planning process reflects the realities of public land management and allows the BLM to timely comply with its statutory mandate to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). Because the RMP revision process is much more time-consuming than enacting a temporary closure order, the BLM could not effectively respond to resource degradation only through the formal planning process. In this way, the BLM's exercise of its authority to address resource degradation--whether done pursuant to 43 C.F.R. § 8342.1(a) or 43 C.F.R. § 8364.1--is not "de facto" planning. Rather, it is a lawful discharge of the BLM's duty, independent of the planning process, to prevent undue degradation of resources.

2. *An Emergency Is Not Required Before the BLM May Close Lands to ORV Use, and Its Decision is Supported by Substantial Evidence.*

USA-ALL also argues that there was no substantial evidence supporting a finding of an emergency, which it contends is necessary before the BLM may place ORV restrictions on the public lands. This contention is completely without merit. The regulation authorizing the challenged orders does not use the word "emergency," nor does it contain any language from which a requirement of an emergency could be inferred.

See 43 C.F.R. § 8341.2; *see also Am. Sand Dune Ass'n*, 268 F. Supp. 2d at 1254 (holding that no emergency is necessary under FLPMA for the BLM to issue ORV closure orders). Rather, the BLM's authority under 43 C.F.R. § 8341.2 is tied to the existence of considerable adverse effects that are being caused by or will be caused by ORV use, and our review of the record convinces us that substantial evidence supports such a finding in this case. For this reason, we also disagree with USA-ALL's contention that the BLM's explanation as to why it issued the closure orders is implausible.

D. NEPA

Next, USA-ALL appears to argue that because NEPA requires preparation of an EA prior to the promulgation of an RMP, *see State of Utah v. Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998), NEPA similarly requires preparation of an EA prior to the amendment of an RMP. We have just held, however, that the closure orders at issue are not amendments. Accordingly, we reject this argument.[4]

In addition, for the first time before this Court, USA-ALL maintains that NEPA compliance is necessary for the closure of public transportation routes, which it apparently understands Utah's wilderness areas to be. This issue, however, was not presented to the District Court; therefore, we do not consider it further. *See Cummings*, 393 F.3d at 1190.

E. NDAA

The District Court properly dismissed USA-ALL's

claims under the NDAA for lack of standing. A party must first have standing before its claim may be adjudicated on the merits. "The standing inquiry requires us to consider both constitutional limits on federal court jurisdiction and prudential limitations on its exercise." *Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1111 (10th Cir. 2002). There is no dispute that USA-ALL meets the requirements of constitutional standing.

With respect to prudential standing, federal courts have long recognized that a plaintiff must satisfy the following prudential principles: "(1) the plaintiff generally must assert his or her own legal rights; (2) the court must refrain from adjudicating generalized grievances most appropriately addressed by one of the other branches of government; and (3) the plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute . . . in question." *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450-51 (10th Cir. 1994) (internal quotation omitted). "The zone of interests test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Id.* at 1452. The burden to establish prudential standing is on the plaintiff bringing the action. *See id.* at 1450.

In our view, USA-ALL has not demonstrated that its interest in using the public lands for ORV and other recreational activities fall within the zone of interests protected by the NDAA. Therefore, USA-ALL may not challenge the BLM's action as violating the NDAA.

F. Factory Butte

Finally, we conclude that the District Court properly concluded that USA-ALL lacked standing to challenge BLM-issued signs encouraging, but not requiring, ORV users to stay on particular routes on land designated as "open." According to USA-ALL, its members have refrained from traveling away from those particular routes because they fear that the BLM will retaliate by closing those areas if those members fail to comply with the BLM's request. The possibility of a mandatory closure, however, is far from imminent, and therefore USA-ALL has failed to allege an "injury in fact" for purposes of standing. *See Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821-22 (10th Cir. 1999).

IV. CONCLUSION

The BLM complied with required procedures under FLPMA and NEPA when it enacted the 2003 Box Elder Order and the Grand County ORV and Camping Restrictions, the BLM's decision close various public lands to ORV use was supported by substantial evidence, and the BLM's reasoning in doing so was not implausible. Further, USA-ALL does not have standing to challenge the Orders and Restrictions under the NDAA, and it also lacks standing to challenge the posting of signs encouraging ORV use only on particular trails. We therefore AFFIRM.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The Moab Field Office oversees the management of public lands in Grand County.

n2 5 U.S.C. App. 2 § 1 *et seq.* USA-ALL later voluntarily dismissed its FACA claim.

n3 USA-ALL does ask this Court to "overturn" E.O. 11989, 43 C.F.R. § 8341.2, and 43 C.F.R. § 8364.1 because they are inconsistent with FLPMA and NEPA; if we were to do so, USA-ALL argues, the BLM would have had no authority for its actions. Because, however, this argument was raised for the first time on appeal, we do not entertain it. *See Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005). Accordingly, our review is limited to whether the BLM acted in accordance with required procedures and whether its actions were arbitrary or capricious.

n4 USA-ALL's argument on this point is not entirely clear. Referencing 42 U.S.C. § 4332(2)(E), which states that "all agencies of the Federal Government shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," USA-ALL contends that the BLM was required to prepare an EA. Although an agency must comply with § 4332(2)(E) in preparing an EA, *see* 40 C.F.R. § 1508.9(b), this subsection is not what triggers the need to prepare an EA. Rather, an agency may choose to prepare an EA "[w]hen it is unclear whether a proposed action requires an EIS." *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). An agency is required to prepare an EIS only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Further muddying the water, USA-ALL makes no attempt to argue how an ORV closure order or camping restriction constitutes either a "proposal" within the meaning of subsection (E) or a "major federal action" under subsection (C). Finally, we note that some courts have

concluded that actions taken to protect the environment need not be predicated by an EA or an EIS. *See Am. Sand Ass'n*, 268 F. Supp. 2d at 1253 ("An environmental assessment or an environmental impact statement is not necessary for federal actions that conserve the environment.") (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995)); *Nat'l Assoc. of Property Owners v. United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980) ("In essence, plaintiffs' claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone. The Court is not moved by this argument."). Therefore, to the extent USA-ALL contends that the issuance of a closure order pursuant to 43 C.F.R. § 8341.2(a) constitutes either a "proposal" or a "major Federal action," we decline to address the issue. *See Craven v. Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218, 1226 (10th Cir. 2001) ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.").

Civil No. 2:01-CV-00804J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH SHARED ACCESS ALLIANCE,
Plaintiff

v.

GLENN CARPENTER, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land Management, MAGGIE WYATT, in her capacity as manager of the Moab Field office of the Bureau of Land Management, SHERWIN SANDBERG, in his capacity as manager of the Monticello Field Office of the Bureau of Land Management; JERRY MEREDITH, in his capacity manager of the Richfield Field Office; SALLY WISELY, in her capacity a Utah State Director of the Bureau of Land Management, GALE A. NORTON, in her capacity as Secretary of the Department of Interior, KATHLEEN CLARKE, in her capacity as director of the Bureau of Land Management, and BUREAU OF LAND MANAGEMENT,
Defendants;

SOUTHERN UTAH WILDERNESS ALIANCE, THE WILDERNESS SOCIETY, GREAT OLD BROADS FOR WILDERNESS, AND WILDLANDS CPR.,
Defendants- Intervenors

December 8, 2004, Decided
December 9, 2004, Filed

COUNSEL: For UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, plaintiff: Paul W. Mortensen, EMAIL, HANKS ROOKER & DENNING, SALT LAKE CITY, UT

For GLENN CARPENTER, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land Management, MAGGIE WYATT, in her capacity as manager of the Moab Field Office of the Bureau of Land Management, SHERWIN SANDBERG, in his capacity as manager of the Monticello Field Office of the Bureau of Land Management, JERRY MEREDITH, in his capacity as manager of the Richfield Field Office of the Bureau of Land Management, SALLY WISELY, in her capacity as Utah State Director of the Bureau of Land Management, GALE A. NORTON, in her capacity as Secretary of the Department of Interior, NINA ROSE HATFIELD, in her capacity as acting director of the Bureau of Land Management, BUREAU OF LAND MANAGEMENT, KATHLEEN CLARKE, In her, capacity as director of the Bureau of Land Management, defendant: Carlie Christensen, Ms., EMALL, Jeffrey E Nelson, Mr., EMALL, US ATTORNEY'S OFFICE

For SOUTHERN UTAH WILDERNESS ALLIANCE, A Utah non-profit corporation, THE WILDERNESS SOCIETY, WILDLANDS CPR, A non-profit corporation, GREAT OLD BROADS FOR WILDERNESS, A non-profit corporation, REDROCK FORESTS, A Utah non - profit corporation, intervenor-defendant: James S. Angell, EMALL, Keith G. Bauerle, EMALL, Eric Biber, EARTHJUSTICE, DENVER, CO; Heidi J. McIntosh, EMALL, Stephen

H. Bloch, EMALL, SOUTHERN UTAH WILDERNESS, ALLINANCE, SALT LAKE CITY, UT

JUDGES: BRUCE S. JENKINS, United States Senior District Judge

OPINION BY: BRUCE S. JENKINS

OPINION:

MEMORANDUM OPINION & ORDER RE: SUPPLEMENTAL COMPLAINT CHALLENGING THE APRIL 24, 2003 BOX ELDER COUNTY ORDER

In a Memorandum Opinion and Order ("Order") dated August 28, 2003, the Court dismissed all of the causes of action of Plaintiff. Utah Shared Access Alliance ("USA-All")'s First Amended Complaint against defendants Glenn Carpenter, et al. (collectively "Defendants"). (*See* Order, dated August-28, 2003 (dkt. no. 118).) The case remained open pending the Court's ruling on the claims set forth in USA-All's Supplemental Complaint Regarding New Box Elder County Restrictions, for which USA-All seeks declaratory and injunctive relief requiring Defendants to acknowledge and to adhere to controlling law and BLM's governing land management plan while managing motorized access to public lands in Box Elder County, Utah. Specifically, USA-All challenges Defendants' April 24, 2003 action restricting land in Box Elder County: USA-All alleges that Defendants have arbitrarily and capriciously abused their emergency authority; violated the directions of their governing land management plan; unlawfully amended

its land use plan to close access roads without utilizing legally - required procedures, public participation and environmental analysis; and violated specific congressional restrictions in the National Defense Authorization Act for fiscal year 2000.

This action arises under the Federal Land Policy and Management Act, *43. U.S.C. § 1701, et. seq. (2000)* ("FLPMA"); the National Environmental Policy Act, *42 U.S.C. § 4331, et. seq. (2000)* ("NEPA"); the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 [*1268] ("NDAA"); and, where applicable, implementing regulations, all made reviewable through the Administrative Procedure Act, *5 U.S.C. § 701 et. seq. (2000)* (the "APA"). *5 U.S.C. § § 702, 704, 706(2).*

Having fully considered the arguments of counsel, the submissions of counsel, and the applicable legal authority, the court now enters the following memorandum opinion and order.

FACTUAL HISTORY

The Box Elder Resource Management Plan ("RMP") was completed in 1986. Under the RMP, 999,634 acres were designated as open to off-highway vehicle ("OHV") travel; 11,180 acres were limited to existing routes; and 980 acres were limited to designated routes.

On January 14, 1998, BLM completed a plan amendment that addressed the management of certain lands that BLM acquired after the RMP was completed. On April 27, 1999, BLM published a "Notice of Closure of Public Lands" closing selected public lands in Box Elder County to OHV travel from January 1 to April 30 of each year. On March 28, 2000, BLM published a "Notice of Closure of Public Lands" closing

certain lands in western Box Elder County to address concerns related to unrestricted cross - country OHV travel in places where resource damage had occurred. On April 24, 2003, BLM issued a "Notice of Limitations of Off Road Vehicles (ORV) Use on Public Lands" with respect to certain defined lands in Box Elder County. 68 Fed. Reg. 20,167 (2003) ("New Order"). The New Order which revoked the two prior notices described above restricted OHV use to designated routes in five described areas in Box Elder County.

USA-All claims that by the New Order, Defendants have restricted use of over 180,000 acres of BLM land in the Pilot Mountains, Grouse Creek Mountains, Devils Playground, Hogup Mountains and Wildcat Hills; that Defendants' restrictions have eliminated open travel in these areas. BLM has closed more than half of the existing roads in these areas. USA-All asserts that their members have in the past traveled in or on areas and roads now so restricted; that USA-All members are restricted in pulling off the road to establish camping sites; and that USA-All members have immediate intentions to travel on existing roads and trails, as well as off-road in restricted areas, but they are afraid of incurring criminal sanctions, being stigmatized, and/or suffering additional access restrictions if they violate the restrictions. USA-All and its members assert that they have been denied the opportunity to participate in motorized access management planning.

Defendants argue that the BLM properly exercised its authority in issuing the New Order; that the New Order is supported by. ample evidence in the administrative record; and that the BLM's issuance of the New Order does not create a "de facto amendment" of the RMP. Specifically, the BLM's Salt Lake Field

Office documented evidence of proliferation of new OHV routes, damage and destruction of vegetation, increased soil erosion, and a likelihood of damage to cultural resources; for these reasons, BLM was required by applicable regulations to close the affected areas until the adverse affects of OHV travel are eliminated. They also contend that USA - All lacks standing to complain of alleged violations of the NDAA, but in any event the BLM's issuance of the New Order did not violate the NDAA.

ISSUES ON APPEAL

1. Does USA-All have standing to challenge any alleged violations by the BLM of the National Defense Authorization Act of 2000? If so, does the New Order violate the National Defense Authorization Act of 2000?

2. Is the New Order unsupported by substantial evidence or otherwise arbitrary and capricious?

3. Does the New Order violate the planning requirements of the Federal Land Policy and Management Act?

4. Does the New Order violate the National Environmental Policy Act.

STANDARD OF REVIEW

USA-All alleges that the New Order violates FLPMA's land use planning requirements, the environmental analysis requirements of the NEPA and the NDAA. Because none of these statutes includes a citizen's suit provision, judicial review is governed by the APA, *5 U.S.C. § § 701 et seq.* Judicial review under

the APA is limited to the administrative record and is narrow in scope. The APA provides that, "the reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*; *see also Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994)*, that is, "whether [BLM] examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.* Agency action is arbitrary and capricious if the decision runs counter to the evidence before the agency or if it is not supported by substantial evidence in the record. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).*

DISCUSSION

I. USA-All Lacks Standing to Challenge the New Order Under the National Defense Authorization Act of 2000.

Defendants and defendant-intervenors dispute that USA - All has standing to challenge the New Order under NDAA. USA-All claims that there has been a violation of Section 2815 of the NDAA, which prevents BLM from amending its RMPs for some of the areas covered by the New Order until the Secretary of Defense studies the impacts that those amendments would have on military readiness. NDAA § 2815, Specifically, USA-All argues that the New Order stripped out interior roads in at least 2 or 3 areas resulting in immense areas that now qualify as 5,000-acre de facto wilderness areas condemned by the

NDAA. (*See* Transcript of Hearing, dated July 16, 2004 ("Tr."), at.16.)

For an APA claim such as this, standing includes the "prudential" requirement that "the plaintiff's complaint must fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Mount Evans Co. v Madigan, 14 F.3d 1444, 1451 (10th Cir. 1994).* A plaintiff must establish that its injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of the complaint." *Id. at 1452* (citations omitted); *see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).* As to § 2815, the NDAA's purpose is to ensure that BLM land-use planning does not vitiate military readiness. NDAA § 2815(a). USA-All's purported injury - the imposition of limits on the ability of its members to ride their machines across the public lands - hardly falls into this zone of interest. USA-All lacks prudential standing to pursue a NDAA claim. Accordingly USA-All's ADA claim based on the NDAA claim must be dismissed.

II. The New Order does not violate either the Federal Land Policy and Management Act or the National Environmental Policy Act.

BLM regulations provide that if the BLM determines that ORVs "are causing or *will cause* considerable adverse effects" to natural resources, .other authorized uses, or other resources, the BLM "*shall* close the area affected to the type(s) of vehicle causing the adverse effect." *43 C.F.R. § 8341.2(a) (2003)* (*emphasis added*). Thus, the regulations do not require evidence of existing adverse effects before use

restrictions can be imposed. Under § *8341.2(a)*, the BLM's role in minimizing user conflicts and damage to natural resources is not strictly reactive. *Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1476-77 (9th Cir. 1994).*

In addition, NEPA sets forth a set of action - forcing procedures that require that agencies take a "hard look" at environmental consequences. *See Friends of the Bow v. Thompson, 124 F.3d 1210,1213 (10th Cir. 1997).* Under NEPA, a federal court must determine whether the agency took the required "hard look" at potential environmental consequences of its decision.

USA - All argues that the New Order is inconsistent with the RMP and that it violates.NEPA and the FLPMA requirements. for public participation and environmental analysis, as well as the FLPMA standards for consistency. USA - All argues that the court must either reject BLM's interpretation or strike the federal regulations down.[1] (*See* Tr.17.)

USA - All is mistaken in asserting that the OHV regulation violates the NEPA and FLPMA public participation, environmental analysis and consistency requirements. As this Court stated in its previous Order, the amendment of an RMP is a different process from the issue of a closure order under the OHV regulations. The amendment or revision of an RMP is a lengthy process that requires a number of steps, including scoping, publication of an environmental impact statement, and public comment. *See generally* 43 C.F.R. Part 1600. BLM's authority to close areas to OHV use, is separate from the plan amendment process and does not require compliance with the amendment procedures. (Order, at 19.)

The plain meaning of the, provision supports this distinction:

> *Notwithstanding the consultation provisions* of *§ 8342.2(a)*, where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects... the authorized officer shall immediately close the areas or trails affected... Such closures will not prevent designation. . ., but these shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence.

43 C.F.R. § 8341.2(a) (*emphasis added*). The BLM's authority to restrict land uses under these regulations is independent of its authority to amend or revise RMPs under FLPMA and 43 C.F.R. Part 1600. These regulations simply enforce FLPMA's mandate. that the BLM "shall by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *43 U.S.C. § 1732(b)*.

Furthermore, the Administrative Record ("AR") is replete with evidence of various real and potential adverse effects supporting the BLM's issuance of the New Order: ORV use has already caused or will cause (1) harm to livestock grazing through the cutting of fences, the opening of gates, and the harassment of livestock; [2] (2) increased risk to soils susceptible to erosion if exposed by ORV use and trail creation;[3] (3) destroyed vegetation in western Box Elder County,

increased bare areas that are vulnerable to colonization by, noxious and invasive weeds, as well as trail proliferation that removes vegetation and increasing soil erosion;[4] (4) considerable adverse effects on wildlife;[5] and (5) diminished visual appeal of the desert landscape.[6]

The court is satisfied that the defendants took the required "hard look" at potential environmental consequences of its decision under NEPA and that the New Order was not arbitrary or capricious under the regulations.

For the reasons discussed above,

IT IS ORDERED that all of the causes of action of USA-All's Supplemental Amended Complaint are DISMISSED with prejudice.

Let judgment be entered accordingly.

DATED this 8th December, 2004.

BY THE COURT

BRUCE S. JENKINS

United States Senior District Judge

JUDGMENT IN A CIVIL CASE

The action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and plaintiff's cause of action is dismissed with prejudice.

December 13, 2004

Footnotes

n1 USA-All states that although it is reluctant to challenge a regulation that on its face if used properly by the agency can help everyone, there is conflict within the governing statutes and the court may be compelled to strike the regulation. Tr.12, In 3-10.

n2 AR 00839-00859.

n3 3AR 00840-00885.

n4 AR 00830-00860, 00918-22.

n5 AR 00841-00861.

n6 AR 00840-00845.

8/28/03
Civil No. 2:01-CV-00804J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH SHARED ACCESS ALLIANCE,
Plaintiff

v.

GLENN CARPENTER, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land Management, MAGGIE WYATT, in her capacity as manager of the Moab Field office of the Bureau of Land Management, SHERWIN SANDBERG, in his capacity as manager of the Monticello Field Office of the Bureau of Land Management; JERRY MEREDITH, in his capacity manager of the Richfield Field Office; SALLY WISELY, in her capacity a Utah State Director of the Bureau of Land Management, GALE A. NORTON, in her capacity as Secretary of the Department of Interior, KATHLEEN CLARKE, in her capacity as director of the Bureau of Land Management, and BUREAU OF LAND MANAGEMENT,
Defendants;

SOUTHERN UTAH WILDERNESS ALIANCE, THE WILDERNESS SOCIETY, GREAT OLD BROADS FOR WILDERNESS, AND WILDLANDS CPR.,
Defendants- Intervenors

[redacted]

I. INTRODUCTION

Plaintiff Utah Shared Access Alliance ("USA-All") challenges a number of actions and alleged failures to act on the part of defendants Glenn Carpenter, et al. (collectively "BLM"). Specifically, USA-All's First Amended Complaint alleges that BLM failed to follow applicable law when BLM issued orders restricting the operation of off-highway vehicles ("OHVS"), mountain bikes, camping, and woodcutting on various tracts of BLM-managed land in Box Elder County, Grand County, San Juan County, and Wayne County, Utah. In addition, USA-All alleges that BLM violated applicable law by posting signs inconsistent with land-use plan designations and by publishing incorrect information with respect to the use of OHVS and mountain bikes on BLM-managed land. USA-All claims that the challenged actions violate provisions of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, et seq.; the National Environmental Policy Act ("NEPA"), 43 U.S.C. §§ 4321, et seq; certain regulations of the Department of the Interior; and land-use plans adopted by BLM.

USA-All also alleges that BLM violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 §§ 1, et seq., by participating in meetings of groups formed for the purpose of discussing land-use issues in Box Elder and Grand Counties.

USA-All's First Amended Complaint requests the following relief: (1) a declaration that BLM's alleged actions and inactions violate applicable law, (2) an order setting aside BLM's orders and actions that allegedly violate applicable law, and (3) an order compelling BLM

to engage in land-use planning with respect to the lands affected by BLM's orders and actions described above.

For the reasons discussed below, the Court dismisses each of USA-All's causes of action with prejudice.

II. LEGAL FRAMEWORK

A. Federal Land Policy and Management Act

Under FLPMA, the BLM is directed to manage the public lands "under principles of multiple use and sustained yield" and "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. §§ 1701(a)(8), 1732(a). "Multiple use" requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes, and so as to prevent unnecessary and undue degradation. Id. at § 1702(c); Public Lands Council v. Babbitt,167 F.3d 1287,1290-91(10th Cir.1999), aff'd, 529 U.S. 728 (2000). "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use. " 43 U.S.C. § 1702(h).

B. Land-Use Plans

To assist in the management of public lands, FLPMA requires that the BLM "develop, maintain, and, when appropriate, revise land use plans ... which provide . . . for the use of the public lands." 43 U.S.C. § 1712(a). In the development and revision of land use plans, the

BLM is required to "use and observe the principles of multiple use and sustained yield." Id. at § 1712(c)(1).

The land-use plans developed by the BLM are generally known as resource management plans ("RMPs"). 43 C.F.R. § 1601.0-5k. Once an RMP is adopted, the BLM is required to "manage the public lands. . . in accordance with the land use plans" 43 U.S.C. § 1732(a); Southern Utah wilderness Alliance v. Norton, 301 F.3d 1217,1233-34 (10th Cir. 2002). RMPs must "establish intervals and standards, as appropriate, for monitoring and evaluation of the plan." 43 C.F.R. §§ 1610.4-9, 1601.0-5(k) (emphasis added). In addition, RMPs shall be revised "as necessary, based on monitoring and evaluation findings Sec. 1610.4-9), new data, new or revised policy and changes in circumstances affecting the entire plan or major portions of the plan." Id. at § 1610.5-6.

C. ORV Executive Orders and Regulations.

Off-road vehicle ("ORV") or off-highway vehicle ("OHV") use represents one of many land uses that the BLM provides for in the management of public lands. In 1972, President Nixon issued an executive order for the purpose of "establish[ing] policies and provid[ing] procedures that will ensure that the use of ORVs on public lands will be controlled and directed so as to protect the resources of those lands, promote the safety of all users of those lands, and minimize conflicts among the various users of those lands." Executive Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972). This executive order established criteria by which federal agencies were to develop regulations and administrative instructions for the designation of specific areas and

trails in which ORVs may and may not be permitted, E.0.11644, § 3. The order also required that agencies "monitor the effects" of ORV use on their public lands and, "[o]n the basis of the information gathered, they shall from time to time amend or rescind designations of areas for ORV use as necessary to further its policy." E.0. 11644, § 8.

In 1977, President Carter amended Executive Order No.11644 "to clarify agency authority" to define zones of use by ORVs on public lands. The order provides that notwithstanding the administrative designation of public lands, federal land management agencies have the authority to close areas and trails to ORVs whenever the agency determines that ORV use "will cause or is causing considerable adverse effects "to particular resources. The order also authorizes agencies to adopt policies that particular lands can be considered closed to ORVs except for areas or trails that are specifically designated as open to such use. Executive Order No. 11989, 42 Fed. Reg. 26959 (May 25, 1977) (both executive orders are referred to as the "ORV Executive Orders").

The Department of the Interior has promulgated regulations implementing the OR Executive Orders and establishing criteria for designating lands as open, limited, or closed to the use of ORVs. 43 C.F.R. Part 8340 (the "ORV Regulations"). The regulations require BLM officials to locate ORV trails and areas so as to minimize user conflicts and damage to natural resources, including wildlife and wildlife habitat, and to prevent impairment of wilderness suitability. Id. at § 8342.1 (a)-(c), Designation of ORV areas is accomplished through the resource management

planning process, and must involve the public and consider the views of interested parties. Id. at § 8342.2(a). After designation is completed, the field manager must take measures to identify designated areas and trails so the public will be aware of the locations and limitations applicable to ORV use. Id. at § 8342.2(b). The field manager shall notify the public by marking areas and trails and by providing informational material such as maps to the public. Id. at § 8342.2(c).

In accordance with the ORV Executive Orders, however, the BLM regulations also provide that if the BLM determines that ORVs "are causing or will cause considerable adverse effects" to natural resources, other authorized uses, or other resources, the BLM "shall close the area affected to the type(s) of vehicle causing the adverse effect." Id. at § 8341.2(a). The BLM is authorized to impose closures under these circumstances without engaging in the public participation requirements of the RMP planning process. Id. (BLM shall close such areas [N]otwithstanding the consultation provisions in § 8342.2(a).") Such closure may remain in effect "until the adverse effects are eliminated and measures implemented to prevent recurrence," Id.

Under the ORV Executive Orders and their implementing regulations, discretion rests with the agencies to determine whether and to what extent specific areas should be closed to ORV use. Sierra Club v. Clark, 756 F.2d 686, 690 (9th Cir. 1984); see also Ohio Valley Trail Riders v. Worthington, 111 F. Supp. 2d 878, 885 (E.D. Ky. 2000) (holding that the Forest Service has broad discretion to prohibit or restrict OHV use where necessary to protect forest resources).

The Council on Environmental Quality, the agency charged with a continuing review of the implementation of the ORV Executive Orders (E.O.11644, § 8(b)), has interpreted the ORV Executive Orders as conferring the responsibility for closing particular areas on "responsible federal officials in the field" "[b]iased on their practical experience in the management of the public lands, and their first-hand knowledge of conditions `on the ground.'" Sierra Club, 756 F.2d at 690.

The BLM's role in minimizing user conflicts and damage to natural resources is not strictly reactive. Northwest Motorcycle Ass'n. v. United States Dep't. of Agric., 18 F.3d 1468, 1476-77 (9th Cir. 1994). Under 43 C.F.R. § 8341.2 when the authorized officer determines that ORVs "are causing or will cause considerable adverse effects," the authorized officer "shall immediately close the areas affected to the types) of vehicle causing the adverse effects" (Emphasis added). Thus, the regulations do not require evidence of existing adverse effects before use restrictions can be imposed. See Northwest Motorcycle Ass'n, 18 F. 3d at 1476-77 (holding that the Forest Service's charge to minimize "user conflict" when developing ORV use plans does not require that actual conflicts exist before restrictions on ORV use can be imposed).

D. Closure and Restriction Orders

The BLM also has the authority, independent of its regulation of ORV use, to close or restrict the use of public lands under its management and supervision. O'Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987). Under the governing regulation, the BLM may

close or restrict the use of designated public lands "to protect persons, property, and public lands and resources." 43 C.F.R. § 8364.1(a).

An order that closes or restricts the use of public lands must identify the public lands that are closed to entry or restricted as to use; specify the uses that are restricted; specify the period of time during which the closure or restriction applies; identify those persons exempt from the closure or restriction; and include a statement of the reasons for the closure. Id. at § 8364.1(b). The order must be posted in designated locations and must be published in the Federal Register. Id. at § 8364.1(c).

III. BLM MANAGEMENT ACTIONS

A. Box Elder County

On April 27, 1999, BLM published a "Notice of Closure of Public Lands" closing selected public lands in Box Elder County to OHV travel from January 1 to April 30 of each year. (ARSLFO 00768-9.) On March 28, 2000, BLM published a "Notice of Closure of Public Lands" under which certain lands in western Box Elder County were closed in order to address concern related to unrestricted cross-county OHV travel in places where resource damage had occurred. (AR SLF000792.) USA-All has challenged these orders on the grounds that they violate FLPMA, NEPA, and applicable regulations.

BLM moved to stay the briefing of these issues on the ground that it intended to revoke the above-described closure orders in Box Elder County and issue a new

closure order affecting a smaller geographic area. On April 24, 2003, BLM issued a "Notice of Limitations of Off Road Vehicles (ORV) Use on Public Lands" with respect to certain defined lands in Box Elder County. 68 Fed. Reg. 20,167 (2003). This order revokes the prior closure orders described above and restricts OHV use to designated routes in five described areas in Box Elder County.

On May 8, 2003, the Court issued an order granting BLM's motion to stay the briefing with respect to the revoked Box Elder County closure orders. The Court also granted USA-All 30 days from the date of the order to file any claims USA-All might choose to file with respect to the new closure order in Box Elder County. On June 6, 2003, USA-All filed a Supplemental Complaint addressing issues relating to the new closure order in Box Elder County. For these reasons, USA-All's challenge to BLM's 1999 and 2000 closure orders is moot, and the Court will not address the merits of those claims in this Memorandum Opinion and Order. See Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000) ("A case is moot when the issues are no longer "live' or the parties lack a legally cognizable interest its the outcome.")

B. Grand County

BLM's Moab Field Office manages over 1.8 million acres of public land in Grand County and part of San Juan County. In 1985, BLM completed a resource management plan ("the Grand RMP") governing the management and use of those lands. (AR MOAB00001.) Under the Grand RMP,1,183,660 acres were designated

as "open" to OHV use; 596,234 acres were designated as limited to existing roads and trails; 15,206 acres were limited to designated roads and trails; and 24,454 acres were closed to OHV use. (AR MOAB00115.)

Since the adoption of the Grand RMP in 1985, recreation and tourism in the Moab area have increased substantially, resulting in a parallel increase in the use of BLM-managed lands. (AR MOAB00002.) By 2000, the Moab Field Office had begun to document various types of adverse effects resulting from increased OHV and mountain bike use on the lands managed by the Moab Field Office. The documented adverse effects included OHV and mountain bike tracks off of main routes and past barriers, tracks through cryptobiotic soils, extensive denuded areas, trail proliferation, user conflicts, soil erosion, and trampling of plants. (AR MOAB00011-12, 00048-64, 00150-154, 00779, 00878.)

In an effort to eliminate these adverse effects, BLM imposed restrictions on OHV travel and other uses of BLM lands managed by the Moab Field Office. On January 22, 2001, BLM published a "Notice of Travel Restrictions" (the "Moab Travel Notice") under which OHV and mountain bike travel in five areas designated as "Moab Travel Management Areas" was limited to existing roads and trails. 66 Fed. Reg. 6659 (2001). (AR MOAB000011-15.) This order affected a total of 245,046 acres, representing 13% of the land managed by the Moab Field Office and 256 of the land that had previously been designated as "open" to OHV travel. (ARMOAB00012.)

Also on January 22, 2001, BLM published a "Notice of Camping and Wood Cutting and Gathering

Restrictions" (the "Moab Camping Notice"). 66 Fed. Reg. 6658 (2001). (AR MOAB00007-10.) Under the Moab Camping Notice, camping with vehicles is limited to developed campgrounds and designated sites in certain described areas and within one-half mile of several designated highways and roads. (AR MOAB00008.) The notice also includes requirements for disposal of solid human waste, restrictions on woodcutting and gathering, and certain restrictions on backpack-type camping in the designated areas. (AR MOAB00008-9.) The Moab Travel and Camping Notices were implemented "on an interim basis . . . pending revision of the Resource Management Plan (RMP) . . . ." (AR MOAB00007, 00011.) BLM has begun the revision of the Grand RMP and expects to complete the process in March 2006. The revised Grand RMP will include specific travel-related planning, including identification of areas where OHV travel is open, limited, or closed; designation of routes where appropriate; and camping and wood-cutting restrictions to the extent they may be deemed necessary. (Declaration of Katherine P. Mitchell., Par 3.)

The Moab Field Office's monitoring of the areas affected by the Moab Travel and Camping Notices has produced evidence of continuing adverse effects in these areas. This monitoring has revealed evidence of OHV and mountain bike use, off-road tracking, and off-road damage in these areas (AR MOAB01846, 01847, 01848, 01850, 01852, and 01855.)

C. San Juan County

The resource management plan for the San Juan Resource Area (the "San Juan RMP"), which includes

land currently managed by the Monticello Field Office, was adopted on March 18, 1991 (AR MONT00001.) Under the San Juan RMP, lands in the Indian Creek Canyon Corridor ("ICCC") were generally designated as "open" to OHV travel.

After the adoption of the San Juan RMP, use of OHVs in the ICCC increased. (AR MONT 00181.) This resulted in a proliferation of trails in the ICCC, along with damage to riparian areas, vegetation, soil, and visual and cultural resources. (AR MONT00132.) Because of these adverse effects on resources, the Monticello Field Office published a "Notice of Recreation Use Restrictions for Indian Creek Canyon Corridor" (the "Monticello Recreation Notice") on January 2, 1998. (AR MONT00132.) The Monticello Recreation Notice restricted the use of OHVs and mountain bikes to existing roads and trails; restricted camping to improved recreation sites with facilities for overnight use or designated undeveloped campsites; prohibited woodgathering within one-half mile of motorized routes; and required that campfires within onehalf mile of motorized routes be built only in BLM-constructed fire rings, designated fire rings, or fire pans. (AR MONT00132.)

The Monticello Recreation Notice states that it "shall remain in effect pending the completion of the Indian Creek Canyon Corridor Recreation Plan" or until updated by the authorized office," (AR MONT00132.) BLM has begun the revision of the San Juan RMP and expects to complete that process by March 2006, (Mitchell Decl., ¶ 13.)

The administrative record includes evidence that

adverse effects continue to exist in the ICCC area. Monitoring reports have revealed instances of hill-climbing activity, travel off of existing routes, off-trail damage, and undeveloped campsites in the ICCC. (AR MONT001 81, 00328, 00333, 00335, 00337, 00338, 00339, 00340, 00799, 00850, 00851, 00997.)

USA-All contends that BLM has placed signs in the ICCC area and prepared maps and visitor information that are inconsistent with the San Juan RMP and the Monticello Recreation Notice. (First Amended Complaint, ¶¶ 130-132.) Katherine P. Mitchell, BLM's Deputy State Director, represented that she met with USA-All's representative, Brian Hawthorns, to discuss these issues, and that BLM has taken steps to remedy any inconsistencies between the Monticello Recreation Notice and the signs and other visitor information in the ICCC area. (Kitchell Decl. Par. 11). Mr. Hawthorne responded that BLM had corrected at least some of the allegedly incorrect signs and information. (Second Declaration of Brian Hawthorne, Par. 2.) Counsel for the BLM represented that BLM intends to remedy any remaining inconsistencies between the Monticello Recreation Notice and the signs and other visitor information in the ICCC area.

D. Factory Butte Area

The land-use plan for the Henry Mountain Field Station was adopted in 1982, and a specific OHV implementation plan, which includes the Factory Butte area, was adapted in 1988. Under the 1988 OHV plan, the majority of the lands near Factory Butte were designated as "open" to OHV travel. In addition, the plan identified a 640-acre "play area" where OHV use

was encouraged. (AR RICH00003.)

USA-All contends that BLM's signs and media violate FLPMA's consistency mandate, 43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5-3(a), because they are inconsistent with requirements set forth in BLM's governing land-use plan. (Plaintiff's First Amended Complaint ¶¶ 148-153; Plaintiff's Opening Brief at 87-90; Plaintiff's Reply Brief at 16-19.) USA-All also alleges that BLM has violated FLPMA and NEPA by requesting, through signs, handouts, and personal contacts, that OHV users voluntarily use the "OHV play area" while staying on existing roads and trails elsewhere in the Factory Butte area. (First Amended Complaint, Ninth and Tenth Causes of Action; USA-All's Opening Brief at 81-95.) USA-All alleges that some of its members have refrained from traveling in open areas in the Factory Butte area because they fear that BLM will retaliate by closing these areas if USA-All's members fail to voluntarily comply with BLM's requests. (First Hawthorne Decl., ¶ 15.)

BLM's Deputy State Director represented that she met with USA-All's representative, Brian Hawthorne, to discuss this issue, and that BLM has modified language on signs and other information provided to the public in the Factory Butte area. (Kitchen Decl., ¶ 11.) Mr. Hawthorne does not dispute that BLM has addressed USA-All's concerns. (Second Hawthorne Decl., ¶13.)

IV. DISCUSSION

A. Standard of Review

USA-All challenges BLM's actions and alleged

inactions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. USA-All challenges BLM's actions under U.S.C. § 706(2) on the ground that USA-All's actions are arbitrary, capricious, in excess of statutory authority, without observance of procedure required by law, or otherwise not in accordance with law. "The duty of a reviewing court under the `arbitrary and capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rationale connection between the facts found and decision made." Olenhouse v. Commodity Credit ., 42 F.3d 1560, 1574 (10th Cir. 1994) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 4 (1983)).

USA-All also challenges BLM"s alleged failure to undertake FLPMA planning and NEPA analysis under 5 U.S.C. § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." Courts may grant relief under Section 706(1) only in the case of mandatory, nondiscretionary duties. "[I]f a duty is not mandated, or if an agency possesses discretion over whether to act in the first instance, a court may not grant relief under § 706(1)" Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1226 (10th Cir. 2002).

B. BLM's Issuance of Closure Orders

1. Moab Travel and Camping Notices

USA-All contends that BLM's orders restricting OHV travel, camping, and woodcutting in Grand County are not supported by substantial evidence in the record. The Court disagrees.

When reviewing agency action under Section 706(2) of the APA, the Court's role is limited to determining whether the agency relied on appropriate factors in making its decision and whether there is substantial evidence in the record that supports the decision, Olenhouse, 42 F.3d at 1574. The Court may not substitute its judgment far that of the agency, even if the Court might have made a different choice. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1030 (10th Cir. 2001), cert. denied, 534 U.S. 1127 (2002). In reviewing agency action, the Tenth Circuit has held that "if Congress has not directly addressed the issue, the agency possesses broad discretion in administering the law so long as its actions are based on a permissible construction of its enabling statute . . . , This discretion is even greater where, as here, the agency's actions are based on the interpretation of its own regulations." Valley Camp of Utah v. Babbitt, 24 F.3d 1263, 1267 (10h Cir.1994) (citations omitted). "[T]he scope of review of an agency's factual findings is very narrow where the [agency] has been vested with substantial discretion, as in the administration of public land." Sierra Club v. Clark, 756 F.2d at 691 (citation omitted).

The regulations relevant to this case that authorize BLM to restrict permissible uses of public land are 43 C.F.R. §§ 8341.2 and 8364.1. Under Section 8341.2(a), BLM is required to immediately close any area to OHV travel where "off-road vehicles are causing or will cause considerable adverse effects . . . ." (Emphasis added.) Under this regulation, it is not necessary that BLM demonstrate that adverse effects have already occurred in each area where OHV use will be limited. Instead, BLM may restrict OHV use in areas where it has documented the existence of adverse effects or where it

has determined in the exercise of its judgment that adverse effects are likely to occur. See Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture, 18 F.3d at 1466-67 (holding that the Forest Service need not prove existing considerable adverse effects in order to justify restriction of OHV use under a Forest Service regulation, 36 C.F.R. § 295.5, mandating restriction where OHV use "will" cause or is "likely" to cause considerable adverse effects).

In addition, under 43 C.F.R. § 8364.1(a), BLM is authorized to restrict uses of federal land in order "to protect persons, property, and public lands and resources.)" This regulation authorizes BLM to restrict uses other than OHV travel, including mountain biking, camping, and woodcutting.

As set forth above, the administrative record contains substantial evidence of various adverse effects supporting BLM's issuance of the Moab Travel and Camping Notices, including evidence of tracks off of main routes and beyond barriers, tracks through cryptobiotic soils, litter and other waste products on trails, trail proliferation, and damage to soil and vegetation. Moreover, the camping and woodcutting restrictions are adequately supported by substantial evidence in the record that BLM' action was required in order "to protect persons, property, and public lands and resources" under 43 C.F.R. § 8364.1(a).

The administrative record also contains substantial evidence supporting BLM's determination to maintain the Moab Travel and Camping Notices in effect. Under 43 C.F.R. § 8341.2(a), areas where OHV travel is restricted due to the actual or potential presence of

considerable adverse effects "shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence." Id. at § 8341.2(a) (emphasis added). The administrative record contains substantial evidence that the adverse effects in the areas covered by the Moab Travel and Camping Notices have not been eliminated. BLM monitoring reports contain evidence of continuing instances of damage and adverse effects resulting from OHV travel in the areas covered by these notices. Since the adverse effects that gave rise to the notices have not been eliminated, BLM is justified in maintaining these restrictions in effect.

2. Monticello Recreation Notice

USA-All does not allege that the Monticello Recreation Notice was unjustified or unsupported by substantial evidence. (USA-All's Opening Brief at 70 n.126.) USA-All alleges, however, that BLM is not justified in maintaining the Monticello Recreation Notice in effect. (First Amended Complaint, Seventh and Eighth Causes of Action.)

As set forth above, the administrative record contains substantial evidence that resource damage and adverse effects continue to exist in the ICCC since the Monticello Recreation Notice was issued in 1998. The record contains evidence of hill-climbing activity, travel off existing roads, numerous off-road tracks, and other instances of resource damage in the ICCC area. Since the adverse effects that gave rise to the Monticello Recreation Notice have not been eliminated, BLM has

lawfully maintained those restrictions in place. 43 C.F.R. § 8341.2(a).

C. Time Limit of Closure Orders

USA-All contends that orders restricting the use of federal lands under 43 C.F.R. § 8341.2 and 8364.1 must either contain specific expiration dates or be deemed to have expired after a period of no more than three years. (First Amended Complaint, ¶80, 89, 128; USA-All's Opening Brief at 60-61, 75-76.) Under 43 C.F.R. § 8341.2, areas that are closed to OHV travel due to the existence of considerable adverse effects "shall not be opened" until the adverse effects are eliminated. The regulation contains no provision for expiration within a particular period of time. To the contrary, the expiration of closure orders issued under 43 C.F.R. § 8341.2 is governed by the existence or elimination of the adverse effects that gave rise to the closure orders. Until those adverse effects have been eliminated, BLM is required to maintain the closure orders in effect. BLM must, on an ongoing periodic basis, review conditions relied upon to issue the closure orders challenged herein. 43 C.F.R. § 8341.2(a).

Under 43 C.F.R. § 8364.1, BLM is required to "specify the period of time during which the closure or restriction shall apply." 43 C. F. R, § 8364.1 (b)(3). This language, however, does not require that BLM specify an expiration date.

The Moab Travel and Camping Notices state that they "shall remain in effect until modified or the RMP is amended." (AR MOAB0007, -11.) Similarly, the Monticello Recreation Notice states that it "shall

remain in effect pending the completion of the Indian Creek Canyon Corridor Recreation Plan or until updated by the authorized officer." (AR MONT000132.) BLM has begun the revision of the Grand and San Juan RMPs and intends to complete those projects by March 2006. Therefore, BLM has complied with the requirement of 43 C.F.R. § 8364.1 that it "specify the period of time during which the closure order restriction shall apply" by linking the expiration of those closure orders to the completion of the revisions of the Grand and San Juan RMPs.

D. Land-Use Planning

1. "De Facto Amendment" Claim

USA-All contends that BLM's issuance of closure orders and other use restrictions has created "de facto" amendments of the applicable resource management plans. (First Amended Complaint, ¶¶ 81, 86, 91, 107, 129, 156.) The amendment and revision of land-use plans is accomplished as part of the planning process set forth in 43 C.F.R. Part 1600. The amendment or revision of a land use plan is a lengthy process that requires that BLM engage in a scoping process to identify relevant issues; evaluate the effects of alternative courses of action; prepare a draft environmental impact statement; analyze public comments; publish a final environmental impact statement with a proposed revised RMP; and resolve any protests to the proposed RMP. (Kitchell Decl., Par. 3.)

BLM is also authorized, independent of the formal planning process, to take action in response to resource

damage by closing areas and otherwise restricting uses of federal lands pursuant to 43 C.F.R. §§ 8341.2 and 8364.1. These regulations implement FLPMA's mandate that BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C; § 1732(b).

BLM's authority to restrict land uses under these regulations is independent of its authority to amend or revise RMPs under FLPMA and 43 C.F.R. Subpart 1600. See 43 C.F.R., § 8341.2(a) (BLM is required to close areas that are suffering or will suffer considerable adverse effects "[n]otwithstanding the consultation provisions in § 8342.2(a)"); see also Sierra Club v. Clark, 756 F.2d at 690 ("[T]his provision [43 C.F.R. § 8341.2(a)] creates a separate duty to close without regard to the designation process; it does not automatically become inoperative once the Secretary exercises its discretion to designate land"); American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 796 n.14 (C.D. Cal. 1982) ("This closure standard [under 43 C.F. R. § 8341.2] is to be distinguished from the initial designation criteria set forth in E.O. 11, 644 and mirrored in 43 C.F.R. § 8342.1.").

Although BLM's issuance of the challenged orders modifies the permissible uses of BLM-managed land outside the framework of the land-use planning process, the orders are consistent with BLM's authority under 43 C.F.R. §§ 8341.2 and 8364.1. BLM's issuance of these orders and closures does not constitute "de facto" plan amendments.

2. Section 706(l) claims

USA-All alleges that BLM has unlawfully withheld or unreasonably delayed the amendment of the Grand and San Juan RMPs and the Henry Mountains Management Framework Plan, and that BLM should be compelled to engage in the plan amendment process. (First Amended Complaint, Fourth, Sixth, Seventh, and Eighth Causes of Action.) Under FLPMA, the Secretary of the Interior "shall ... develop, maintain, and, when appropriate, revise land-use plans . . . ." 43 U. S.C. § 1712(a). BLM is required by regulation to monitor and evaluate landuse plans and "as appropriate to determine whether there is sufficient cause to warrant amendment or revision of the plan." 43 C.F.R. § 1610.4-9. These provisions leave the determination of the timing of land-use plan amendment and revision largely to the discretion of the BLM. Since there is no specified interval or date-certain deadline for the initiation and completion of land-use plan amendments and revisions, there is no basis for a claim that BLM has "unlawfully withheld" that action. Forest Guardians v. Babbitt,174 F.3d 1178, 1190-91 (10th Cir. 1999).

The facts before the Court also fail to support a claim that BLM has "unreasonably delayed" land-use planning in these areas. BLM has initiated revisions of the R MPs governing the areas managed by the Moab, Monticello, and Richfield Field Offices BLM shall, pursuant to 43 C.F.R. Part 1600, provide USA-All and its members full opportunity to participate in the planning process. BLM estimates that the plan revisions will be completed by March 2006. Therefore, BLM has not "unreasonably delayed" the process of revising these land-use plans.

E. Management Actions in the ICCC and Factory

Butte Areas

USA-All alleges that BLM has placed inaccurate informational signs and disseminated misleading information to public land users in the ICCC area in San Juan County. USA-All also alleges that BLM has improperly requested public land users in the Factory Butte area to voluntarily restrict their OHV use to an "OHV play area" and otherwise to remain on existing trails in the Factory Butte area. (First Amended Complaint, Seventh, Eighth, and Ninth Causes of Action.)

BLM's efforts to manage the use of public lands and the effects of OHV use are not at odds with BLM's obligation to engage in land-use planning as appropriate. FLPMA requires BLM to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). In addition, Congress directed BLM to manage the public lands "for outdoor recreation" as well as "to preserve and protect certain public lands in their natural condition." Id. at § 1701(a)(8). BLM is therefore authorized to take steps short of formal planning - - such as placing signs on the ground and disseminating information to the public - - in an effort to prevent unnecessary and undue degradation of the lands under BLM's control. Even if such efforts in the Factory Butte and ICCC areas may have been in error, the record demonstrates that BLM has taken steps to correct such errors.

Furthermore, USA-All lacks standing to object to BLM's request that OHV users in the Factory Butte area remain on existing trails outside the designated

"OHV play area." BLM has requested that OHV users in the Factory Butte area voluntarily restrict their activities. BLM has not imposed a mandatory closure or restriction. In fact, the language in the current sign and hand-out in use at the OHV play area states in bold print that the "Factory Butte area outside the designated Play Area is also open to off-road use and such use is permissible." (AR RICH00408, 00414) BLM's request for voluntary compliance does not constitute an "'injury in fact" sufficient to confer standing on USA-All and its members. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F. 3d 814, 821 (10th Cir. 1999, cert denied, 629 U.S. 1037(2000).

Finally, the declarations submitted by both USA-All and BLM indicate that the parties have discussed these issues and have agreed on the steps needed to resolve them. (Kitchell Decl., ¶ 11; Second Hawthorne Decl., ¶¶ 2-3) Thus, these issues are moot, and the Court need not address them further. See Southern Utah wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 2000) (issues are moot where changed circumstances since the beginning of litigation "forestall any occasion for meaningful relief').

Federal Advisory Committee Act

USA-All alleged that BLM violated FACA by participating with local groups that were formed to address OHV issues in Box Elder and Grand Counties. In Box Elder County, BLM participated with the west Box Elder Access Management Team ("'Box Elder Team"), USA-All requested, among other things, judgment voiding the closure orders issued with respect to BLM lands in Box Elder County. (USA-All's

Opening Brief at 104-5.) This issue is moot, however, because BLM has revoked those closure orders and issued a new closure order. USA-All has filed a Supplemental Complaint with respect to the new closure order in Box Elder County, and USA-All's claims with respect to BLM's actions in Box Elder County will be addressed in connection with the Supplemental Complaint.

In Grand County, BLM participated with the Grand County Access Committee ("GCAC"). USA-All requested injunctive relief with respect to BLM's participation with the GCAC. (USA-All's Opening Brief at 104.) However, USA-All lacks standing to sue for any alleged violation of FACA in connection with the GCAC. The GCAC was organized on March 29, 2001, over two months after BLM issued the Moab Travel and Camping Notices that USAAll challenges in the present case. (AR MOAB00942.) The Grand County Council terminated the GCAC effective August 8, 2002, and the GCAC produced no recommendations or other completed work product. (von Koch Decl. Par. 8.) Thus, USA-All cannot show the "injury in fact" required to establish standing to seek relief under FACA. Fertilizer Institute v. U.S. Envtl. Protection Agency., 938 F. Supp 52, 55 (D. D. C.1996).

V. CONCLUSION

For the reasons discussed above,

IT IS ORDERED that all of the causes of action of USA-All's First Amended Complaint are dismissed with prejudice.

IT I FURTHER ORDERED that this case shall remain open pending the Court's ruling on the claims set forth in USA-All's Supplemental Complaint Regarding New Box Elder County Restrictions.

Dated this 28 day of May, 2003.

Civil No. 2:01 CV 804J
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTAH SHARED ACCESS ALLIANCE Utah non-profit corporation,
Plaintiffs,

VS.

GLENN CARPENTER, et al., Defendants,
SOUTHERN UTAH WILDERNESS ALLIANCE, et al.
Defendants -Intervenors.

ORDER

The Federal Defendants' Motion to Stay was heard by the Court on April 23, 2003. Jeffrey E. Nelson represented the Federal Defendants; Paul W. Mortensen represented the Plaintiffs; and Stephen H.M. Bloch represented the Defendants-Intervenors. Based on the memoranda submitted by the parties and the arguments of counsel,

IT IS HEREBY ORDERED as follows:

The oral argument will proceed as scheduled at 9:30 a.m. on Wednesday, May 21, 2003, on the issues briefed by Plaintiff that are not resolved by BLM's revocation of the two closure orders affecting certain BLM-managed lands in Box Elder County.

2. If Plaintiff decides to assert any claim with respect to the new order published by BLM with

respect to certain BLM-managed lands in Box Elder County, Plaintiff shall allege any such claim by filing an appropriate amended pleading within 30 days from the date of this Order. In the event Plaintiff files such a claim with respect to the new order in Box Elder County, the issues arising from Plaintiff's new claim or claims shall be briefed and argued separately from the argument to be held on May 21, 2003.

Dated this 8th day of May, 2003.

No. 05-4009

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation,
Plaintiff-Appellant,

v.

GLENN CARPENTER, in his capacity as manager of the Salt Lake Field Office of the Bureau of Land Management; MAGGIE WYATT, in her capacity as manager of the Moab Field Office of the Bureau of Land Management; SHERWIN SANDBERG, in his capacity as manager of the Monticello Field Office of the Bureau of Land Management; JERRY MEREDITH, in his capacity as manager of the Richfield Field Office of the Bureau of Land Management; SALLY WISELY, in her capacity as Utah State Director of the Bureau of Land Management; GALE A. NORTON, in her capacity as Secretary of the Department of Interior; BUREAU OF LAND MANAGEMENT; KATHLEEN CLARKE, in her capacity as director of the Bureau of Land Management, Defendants-Appellees,

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation; THE WILDERNESS SOCIETY; WILDLANDS CPR, a non-profit corporation; GREAT OLD BROADS FOR WILDERNESS, a non-profit corporation; REDROCK FORESTS, a Utah non-profit corporation,
Defendants-Intervenors-Appellees.

ORDER

Filed November 21, 2006

JUDGES: Before TACHA, Chief Circuit Judge, McWILLIAMS, Senior Circuit Judge, and O'BRIEN, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. Entered for the Court

FLPMA Sec. 103(d) 43 U.S.C. § 1702(d)

(d) The term "public involvement" means the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.

FLPMA Sec. 202 43 U.S.C. § 1712. Land use plans

(a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

(c) Criteria for development and revision

In the development and revision of land use plans, the

Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C. 460l–4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive,

the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

(d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

(e) Management decisions for implementation of

developed or revised plans

The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

(1) Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.

(2) Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate. If within ninety days from the giving of such notice (exclusive of days on which either House has adjourned for more than three consecutive days), the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the management decision or action. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon

shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same management decision or action. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(3) Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318–2352; 30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law: Provided, That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

(f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish

procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

FLPMA Sec. 302(a) 43 U.S.C. § 1732(a).

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

FLPMA Sec. 302(b) 43 U.S.C. § 1732(b).

(b)In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: Provided, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where

the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737 (b) of this title: Provided further, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

FLPMA Sec. 309(e) 43 U.S.C. § 1739(e).

In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

2005 CFR 43 § 1601.0-2

The objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.

2005 CFR 43 § 1601.0-5(k).

(k) Public means affected or interested individuals, including consumer organizations. public land resource users, corporations and other business entities, environmental organizations and other special interest groups and officials of State, local, and Indian tribal governments.

2005 CFR 43 §1610.1

(c) An interdisciplinary approach shall be used in the preparation, amendment and revision of resource management plans as provided in 40 CFR 1502.6. The disciplines of the preparers shall be appropriate to the values involved and the issues identified during the issue identification and environmental impact statement scoping stage of the planning process. The Field Manager may use any necessary combination of Bureau of Land Management staff, consultants, contractors, other governmental personnel, and

advisors to achieve an interdisciplinary approach.

2005 CFR 43 § 1610.2 Public participation.

(a) The public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities. Public involvement in the resource management planning process shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations.

(b) The Director shall, early in each fiscal year, publish a planning schedule advising the public of the status of each plan in process of preparation or to be started during that fiscal year, the major action on each plan during that fiscal year and projected new planning starts for the 3 succeeding fiscal years. The notice shall call for public comments on projected new planning starts so that such comments can be considered in refining priorities for those years.

(c) When BLM starts to prepare, amend, or revise resource management plans we will begin the process by publishing a notice in the Federal Register and appropriate local media, including newspapers of general circulation in the state and field office area. The Field Manager may also decide if it is appropriate to publish a notice in media in adjoining States. This notice may also constitute the scoping notice required by regulation for the National Environmental Policy Act (40 CFR 1501.7). This notice shall include the following:

(1) Description of the proposed planning action;

(2) Identification of the geographic area for which the plan is to be prepared;

(3) The general types of issues anticipated;
(4) The disciplines to be represented and used to prepare the plan;
(5) The kind and extent of public participation opportunities to be provided;
(6) The times, dates and locations scheduled or anticipated for any public meetings, hearings, conferences or other gatherings, as known at the time;
(7) The name, title, address and telephone number of the Bureau of Land Management official who may be contacted for further information; and
(8) The location and availability of documents relevant to the planning process.
(d) A list of individuals and groups known to be interested in or affected by a resource management plan shall be maintained by the Field Manager and those on the list shall be notified of public participation activities. Individuals or groups may ask to be placed on this list. Public participation activities conducted by the Bureau of Land Management shall be documented by a record or summary of the principal issues discussed and comments made.
The documentation together with a list of attendees shall be available to the public and open for 30 days to any participant who wishes to clarify the views he/she expressed.
(e) At least 15 days' public notice shall be given for public participation activities where the public is invited to attend. Any notice requesting written comments shall provide for at least 30 calendar days for response. Ninety days shall be provided for review of the draft plan and draft environmental impact statement. The 90-day period shall begin when the Environmental Protection Agency publishes a notice of the filing of the draft environmental impact statement

in the Federal Register.

(f) Public notice and opportunity for participation in resource mangement plan preparation shall be appropriate to the areas and people involved and shall be provided at the following specific points in the planning process:

(1) General notice at the outset of the process inviting participation in the identification of issues (See §§1610.2(c) and 1610.4–1);

(2) Review of the proposed planning criteria (See §1610.4–2);

(3) Publication of the draft resource management plan and draft environmental impact statement (See §1610.4–7);

(4) Publication of the proposed resource management plan and final environmental impact statement which triggers the opportunity for protest (See §§1610.4–8 and 1610.5–1(b)); and

(5) Public notice and comment on any significant change made to the plan as a result of action on a protest (See §1610.5–1(b)).

(g) BLM will make copies of an approved resource management plan and amendments reasonably available for public review. Upon request, we will make single copies available to the public during the public participation process. After BLM approves a plan, amendment, or revision we may charge a fee for additional copies. We will also have copies available for public review at the:

(1) State Office that has jurisdiction over the lands,

(2) Field Office that prepared the plan; and

(3) District Office, if any, having jurisdiction over the Field Office that prepared the plan.

(h) Supporting documents to a resource management plan shall be available for public review at the office

where the plan was prepared.

(i) Fees for reproducing requested documents beyond those used as part of the public participation activities and other than single copies of the printed plan amendment or revision may be charged according to the Department of the Interior schedule for Freedom of Information Act requests in 43 CFR part 2.

(j) When resource management plans involve areas of potential mining for coal by means other than underground mining, and the surface is privately owned, the Bureau of Land Management shall consult with all surface owners who meet the criteria in §3400.0–5 of this title. Contact shall be made in accordance with subpart 3427 of this title and shall provide time to fully consider surface owner views. This contact may be made by mail or in person by the Field Manager or his/her appropriate representative. A period of at least 30 days from the time of contact shall be provided for surface owners to convey their preference to the Field Manager.

(k) If the plan involves potential for coal leasing, a public hearing shall be provided prior to the approval of the plan, if requested by any person having an interest which is, or may be, adversely affected by implementation of such plan. The hearing shall be conducted as prescribed in §3420.1–5 of this title and may be combined with a regularly scheduled public meeting. The authorized officer conducting the hearing shall:

(1) Publish a notice of the hearing in a newspaper of general circulation in the affected geographical area at least once a week for 2 consecutive weeks;

(2) Provide an opportunity for testimony by anyone who so desires; and

(3) Prepare a record of the proceedings of the hearing.

2005 CFR 43 §1610.5-3

(a) All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan.

(b) After a plan is approved or amended, and if otherwise authorized by law, regulation, contract, permit, cooperative agreement or other instrument of occupancy and use, the Field Manager shall take appropriate measures, subject to valid existing rights, to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved plan or amendment within a reasonable period of time. Any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation.

(c) If a proposed action is not in conformance, and warrants further consideration before a plan revision is scheduled, such consideration shall be through a plan amendment in accordance with the provisions of §1610.5–5 of this title.

(d) More detailed and site specific plans for coal, oil shale and tar sand resources shall be prepared in accordance with specific regulations for those resources: Group 3400 of this title for coal; Group 3900 of this title for oil shale; and part 3140 of this title for tar sand. These activity plans shall be in conformance with land use plans prepared and approved under the provisions of this part.

2005 CFR 43 §1610.5-5

A resource management plan may be changed through amendment. An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan. An amendment shall be made through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in §1610.2 of this title, interagency coordination and consistency determination as prescribed in §1610.3 of this title and any other data or analysis that may be appropriate. In all cases, the effect of the amendment on the plan shall be evaluated. If the amendment is being considered in response to a specific proposal, the analysis required for the proposal and for the amendment may occur simultaneously.

(a) If the environmental assessment does not disclose significant impact, a finding of no significant impact may be made by the Field Manager. The Field Manager shall then make a recommendation on the amendment to the State Director for approval, and upon approval, the Field Manager shall issue a public notice of the action taken on the amendment. If the amendment is approved, it may be implemented 30 days after such notice.

(b) If a decision is made to prepare an environmental impact statement, the amending process shall follow the same procedure required for the preparation and approval of the plan, but consideration shall be limited to that portion of the plan being considered for

amendment. If several plans are being amended simultaneously, a single environmental impact statement may be prepared to cover all amendments.

2005 CFR 43 §1610.5-6

A resource management plan shall be revised as necessary, based on monitoring and evaluation findings (§1610.4–9), new data, new or revised policy and changes in circumstances affecting the entire plan or major portions of the plan. Revisions shall comply with all of the requirements of these regulations for preparing and approving an original resource management plan.

43 CFR § 8340.0-5 Definitions.

As used in this part:
(a) Off-road vehicle means any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain, excluding:
(1) Any nonamphibious registered motorboat;
(2) Any military, fire, emergency, or law enforcement vehicle while being used for emergency purposes;
(3) Any vehicle whose use is expressly authorized by the authorized officer, or otherwise officially approved;
(4) Vehicles in official use; and
(5) Any combat or combat support vehicle when used in times of national defense emergencies.
(b) Public lands means any lands the surface of which is administered by the Bureau of Land Management.
(c) Bureau means the Bureau of Land Management.
(d) Official use means use by an employee, agent, or designated representative of the Federal Government or one of its contractors, in the course of his

employment, agency, or representation.

(e) Planning system means the approach provided in Bureau regulations, directives and manuals to formulate multiple use plans for the public lands. This approach provides for public participation within the system.

(f) Open area means an area where all types of vehicle use is permitted at all times, anywhere in the area subject to the operating regulations and vehicle standards set forth in subparts 8341 and 8342 of this title.

(g) Limited area means an area restricted at certain times, in certain areas, and/or to certain vehicular use. These restrictions may be of any type, but can generally be accommodated within the following type of categories: Numbers of vehicles; types of vehicles; time or season of vehicle use; permitted or licensed use only; use on existing roads and trails; use on designated roads and trails; and other restrictions.

(h) Closed area means an area where off-road vehicle use is prohibited. Use of off-road vehicles in closed areas may be allowed for certain reasons; however, such use shall be made only with the approval of the authorized officer.

(i) Spark arrester is any device which traps or destroys 80 percent or more of the exhaust particles to which it is subjected.

43 CFR § 8341.2 Special rules.

(a) Notwithstanding the consultation provisions in §8342.2(a), where the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources,

threatened or endangered species, wilderness suitability, other authorized uses, or other resources, the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence. Such closures will not prevent designation in accordance with procedures in subpart 8342 of this part, but these lands shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence.

(b) Each State director is authorized to close portions of the public lands to use by off-road vehicles, except those areas or trails which are suitable and specifically designated as open to such use pursuant to subpart 8342 of this part.

43 CFR § 8364.1 Closure and restriction orders.

(a) To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands.

(b) Each order shall:

(1) Identify the public lands, roads, trails or waterways that are closed to entry or restricted as to use;

(2) Specify the uses that are restricted;

(3) Specify the period of time during which the closure or restriction shall apply;

(4) Identify those persons who are exempt from the closure or restrictions;

(5) Be posted in the local Bureau of Land Management Office having jurisdiction over the lands to which the order applies;

(6) Be posted at places near and/or within the area to which the closure or restriction applies, in such manner and location as is reasonable to bring prohibitions to the attention of users;
(7) Include a statement on the reasons for the closure; and
(c) In issuing orders pursuant to this section, the authorized officer shall publish them in the Federal Register.
(d) Any person who fails to comply with a closure or restriction order issued under this subpart may be subject to the penalties provided in §8360.0–7 of this title.

40 CFR § 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of §1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

40 CFR § 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1508.9 Environmental assessment.

Environmental assessment:
(a) Means a concise public document for which a Federal agency is responsible that serves to:
(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
(3) Facilitate preparation of a statement when one is necessary.
(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

BLM Information Clearance Officer.

[FR Doc. 99–10544 Filed 4–26–99; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–020–09–1220–00]

Notice of Closure of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of closure of public lands.

SUMMARY: Notice is hereby given that effective immediately, the public lands within Broad Hollow Unit, Kilgore Basin Unit, Meadows Unit, as legally described below, are seasonally closed from January 1 to April 30 to all motorized vehicle use. The purpose of this closure is to protect wildlife, including critical deer and sage grouse habitat. Exemptions to this closure will apply to administrative personnel of the Bureau of Land Management, BLM authorized permittees and Law Enforcement Personnel. Other exemptions to this closure order may be made on a case by case basis by the authorized officer. This seasonal closure will remain in effect until further notice.

LEGAL DESCRIPTION: This closure order applies to the following lands administered by the Bureau of Land Management, Salt Lake Field Office, within Box Elder County, Utah.

Broad Hollow Unit

T.14 N., R.16 W., SLBM

All public lands located in:

Sec. 8 and 9 south of the Upper Narrows Road,

Sec. 10 SW1/4, S1/2S1/2SE1/4,

Sec. 14 W1/2,

Sec. 17 east of the Upper Narrows Road,

and
Sec. 20 E1/2, S1/2SW1/4.
Kilgore Basin Unit
T.9 N., R.18 W., SLBM
All public lands located in:
Sec. 6 south of Toms Cabin Road,
Sec. 8 west of the Old Grouse Creek Road,
Sec. 18,
Sec. 20 west of the Old Grouse Creek Road,
and
Sec. 30 north of Cabin Springs Road.
T.10 N., R.18 W., SLBM
All public lands in
Sec. 30 located south of Toms Cabin Road.
T.9 N., R.19 W., SLBM
All public lands located in:
Sec. 4, 10, 12, 14, 24, 26,
Sec. 22 E1/2, E1/2NW1/4, SW1/4, and
all of Sec. 28 and 34 north of Cabin Springs Road.
T.10 N., R.19 W., SLBM
The following public lands west of Toms Cabin Road:
Sec. 28 E1/2, Lots 1–4, SE1/4NW1/4,
E1/2SW1/4,
Sec. 34 E1/2, E1/2W1/2, NW1/4NW1/4,
W1/2SW1/4.
Meadows Unit
T.11 N., R.16 W., SLBM
All of Sec. 22, 23, 26, 27, 28, 34, and
All of the public lands in Sec. 33 located north of the Ingham Pass County Road.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management, Salt Lake Field Office, 2370 S. 2300 W., SLC, UT 84119, telephone (801)977–4300.

SUPPLEMENTARY INFORMATION: The authority for this closure is 43 CFR 8341.2 and 43 CFR 8364.1. Violations of this closure are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months as provided in 43 CFR 8360.0–7.

Glenn A. Carpenter,

Salt Lake Field Manager.

[FR Doc. 99–10531 Filed 4–26–99; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–020–00–1220–00]

Notice of Closure of Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Closure of Certain Public Lands in Box Elder County, Utah to Off Road Vehicle Use.

SUMMARY: Notice is hereby given that effective immediately, selected public lands administered by the Bureau of Land Management (BLM), Salt Lake Field Office, within western Box Elder County are closed to off road vehicle (ORV) (also commonly referred to as off highway vehicle—OHV) use on an interim emergency basis. This action will allow BLM to address concerns related to unrestricted cross country travel in the specific places where we now have resource damage. The purpose of this closure is to protect wildlife, wildlife habitat, rangeland resources, soil, vegetation, cultural resources, historical resources, and other resources from ongoing and imminent adverse impacts from ORV use. Exemptions to this closure will apply for administrative and management purposes for the Bureau of Land Management, BLM authorized permittees, and law enforcement personnel. Other

exemptions to this closure order may be made on a case by case basis by the authorized officer. This emergency closure will remain in effect until BLM completes a land use plan amendment for OHV management.

FOR FURTHER INFORMATION CONTACT: Alice Stephenson, Environmental Coordinator, Bureau of Land Management, Salt Lake Field Office, 2370 S. 2300 W., Salt Lake City, UT 84119, telephone (801) 977–4300.

SUPPLEMENTARY INFORMATION: As an interim measure, BLM is joining Box Elder County, the U.S. Forest Service and the State of Utah Sovereign Lands in imposing restrictions for OHV use on public lands in western Box Elder County. The BLM is temporarily closing selected public lands to off highway vehicle use consistent with the County's access road management plan and related map. The new restrictions for public lands, which are identified on the map, include full closure of very limited lands, seasonal closures of specific lands and closures to cross country travel for certain lands. This plan was adopted on July 7, 1998, by the Box Elder County Commission as Ordinance No. 222 which applies to western Box Elder County. This ordinance is the product of recommendations made by the West Box Elder Access Management Team with extensive public involvement and support from BLM, State Sovereign Lands, and the U.S. Forest Service (USFS). With this interim emergency action, BLM joins the County, USFS and State Sovereign Lands in providing consistent OHV management in western Box Elder County regardless of land ownership. Without this action, and because all other lands in western Box Elder County have OHV restrictions, BLM public lands, which are currently open to OHV use without restriction, would be subject

to increasing impacts from OHV use. These closures are a temporary action to protect public lands highway vehicle—OHV) use on an interim emergency basis. This action will allow BLM to address concerns related to unrestricted cross country travel in the specific places where we now have resource damage. The purpose of this closure is to protect wildlife, wildlife habitat, rangeland resources, soil, vegetation, cultural resources, historical resources, and other resources from ongoing and imminent adverse impacts from ORV use. Exemptions to this closure will apply for administrative and management purposes for the Bureau of Land Management, BLM authorized permittees, and law enforcement personnel. Other exemptions to this closure order may be made on a case by case basis by the authorized officer. This emergency closure will remain in effect until BLM completes a land use plan amendment for OHV management.

FOR FURTHER INFORMATION CONTACT: Alice Stephenson, Environmental Coordinator, Bureau of Land Management, Salt Lake Field Office, 2370 S. 2300 W., Salt Lake City, UT 84119, telephone (801) 977–4300.

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Imposing the OHV use restrictions will protect wildlife, wildlife habitat, soil, vegetation, cultural resources, historical resources, and other resources from damage by off-highway vehicles (OHVs).

This closure shall not be construed as a limitation on BLM's future planning and off-highway vehicle route designations.

The referenced map and ordinance is available for review at the above address and at the Box Elder County Mapping Department.

The authority for this closure is 43 CFR 8341.2 and 43 CFR 8364.1.

Violations of this closure are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months as provided in 43 CFR 8360.0–7.

Sally Wisely,
State Director.
[FR Doc. 00–7551 Filed 3–27–00; 8:45 am]
BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR
Bureau of Land Management
[UT–062–01–1220–AA]
Notice of Camping and Wood Cutting and Gathering Restrictions, Moab Field Office
AGENCY: Bureau of Land Management (BLM), DOI.
ACTION: Notice of camping and wood cutting and gathering restrictions—
Moab Field Office, Utah.
SUMMARY: This notice, applicable to specified public lands administered by the BLM Moab Field Office, limits camping to developed campgrounds and designated sites, allows BLM to limit the size of designated camping areas, and requires the use of portable toilets at these designated sites where toilets are not provided. The notice also prohibits wood cutting and gathering, including Christmas tree cutting, for these intensively used areas and the Sand Flats Recreation Area. These actions are implemented on an interim basis to protect natural resources pending revision of the Resource Management Plan (RMP) for the area administered by the Moab Field Office.
DATES: This notice is effective January 22, 2001, and shall remain in effect until modified or the RMP is amended.
FOR FURTHER INFORMATION CONTACT: Russell von Koch, Resource Advisor, BLM Moab Field Office, 82 East Dogwood Avenue, Moab, Utah 84532 or telephone 435–259–2100.

SUPPLEMENTARY INFORMATION: Frequent use of public lands near Moab, Utah for camping at undeveloped sites and associated wood cutting and gathering is damaging soils, vegetation, and scenic values at local destination areas and along popular trails and roads. The following actions are necessary to limit impacts to natural resource values and maintain the quality of recreation opportunities.

Camping Restrictions Along Highway and Road Corridors

Camping with vehicles on BLM administered public land within one-half mile of the following highways and roads is limited to developed campgrounds and designated sites on a year-round basis to protect scenic values, reduce damage to soils and vegetation, and provide for public safety:

(1) Utah Highway 313;

(2) The Island in the Sky entrance road between Utah Highway 313 and Canyonlands National Park;

(3) The Gemini Bridges route (primarily Grand Co. No. 118) and the spur route from it into "The Bride Canyon;"

(4) The Kane Creek Canyon Rim route from U.S. Highway 191 to where it crosses the eastern boundary of section 20, T. 27 S., R. 22 E. exclusive of the state and private land west of Blue Hill; and (5) Lands within Long Canyon north of the Colorado Riverway Recreation Area and south of the State land at the head of the canyon within one-half mile of the Long Canyon Road (Grand Co. No. 135).

Other Camping Restrictions

Camping with vehicles on BLM administered public lands is also limited for the above reasons to developed

campgrounds and designated sites on a year-round basis in the following areas:

(1) The lands along both sides of U.S. 191 bounded by Arches National Park on the east, private lands in Moab Valley on the south, the Potash Rail Spur on the west, and private and State lar 1 near the lower Gemini Bridges Trailhead on the north;

(2) Lands located between the road to Nefertiti Rapid (Grand Co. No. 154) and the shoreline of the Green River along the east side of the river from the public land boundary near Swaseys Take-out upstream to the upper end of the Nefertiti Rapid parking area;

(3) Lands including the Pace Hill, Castle Rock, Ida Gulch, Professor Valley, Mary Jane Canyon, and the upper Onion Creek areas that are south of the Colorado Riverway Recreation Area as established in 1992, below the rims of Adobe and Fisher Mesas, and west of the private land in Fisher Valley;

(4) Lands along the Potash Trail (Grand Co. No. 134, the road between the western end of Utah Highway 279 and Canyonlands National Park) that are east of Canyonlands National Park; south of Dead Horse Point State Park, and other state and private lands, north of the Colorado River, and west of the Colorado Riverway Recreation Area as established in 1992, excluding riverside campsites accessible by water craft from the Colorado River; and

(5) Lands within the Mill Creek Canyon Planning Area. Backpack type camping within the Mill Creek Planning Area is allowed at sites one-quarter mile or farther from designated roads and greater than 100 feet from Mill Creek and from archaeological sites. All camping continues to be prohibited in the Powerdam and Flat Pass areas under a previously published notice.

For all of the above locations, at developed campgrounds and designated sites where camping is authorized, camping and vehicle travel may be limited to posted site boundaries and parking areas.

Possession and use of portable toilets for solid human body waste is required for overnight use at all designated campsites in the areas described above, except at sites where constructed toilets are provided. Disposal of portable toilet waste off public land is required.

Wood Cutting and Gathering Restrictions

Wood cutting and gathering, including Christmas tree cutting, on BLM administered public land, within all of the areas described above under Camping Restrictions, is prohibited at all times to protect scenic values and vegetation. In addition, wood cutting and gathering, including Christmas tree cutting, is prohibited within the Sand Flats Recreation Area.

Exceptions

Camping and wood cutting and gathering restrictions do not apply to activities permitted by the BLM (including traditional and historic uses by Native Americans); BLM official uses; or military, fire, emergency, or law enforcement actions.

Implementation

Maps showing these and all current Moab Field Office camping and wood cutting and gathering restrictions are available for public review at the Moab Field Office. These restrictions are also shown on a map on the Moab Field Office's website at *http://www.blm.gov/utah/moab.* BLM will provide public land users with information about these camping and wood cutting and gathering restrictions using brochures, signs, and bulletin boards with maps at major entry areas. Enforcement actions will be taken as necessary.

Authority: Pub. L. 94–579, 43 CFR 8364.1.
Dated: January 12, 2001.
Sally Wisely,
State Director.
[FR Doc. 01–1594 Filed 1–19–01; 8:45 am]
BILLING CODE 4310–DQ–U

DEPARTMENT OF THE INTERIOR
Bureau of Land Management
[UT–062–01–1220–AA]
Notice of Travel Restrictions

AGENCY: Bureau of Land Management (BLM), DOI.

ACTION: Notice of Travel Restrictions, Moab Field Office, Utah.

SUMMARY: This notice places restrictions on travel by off-road vehicles (ORV's) and mountain bikes on specific public land administered by the BLM Moab Field Office. These actions are necessary to halt ongoing impacts and prevent future degradation of resource values.

They are being implemented on an interim basis to protect resource values and public safety, pending revision of the Resource Management Plan (RMP) for the area administered by the BLM Moab Field Office. This notice also affirms and describes previous travel restrictions that remain in effect.

DATES: This notice is effective January 22, 2001, and shall remain in effect until modified or the RMP is amended.

FOR FURTHER INFORMATION CONTACT: Russell von Koch, Resource Advisor, BLM Moab Field Office, 82 East Dogwood Avenue, Moab, Utah 84532 or telephone 435–259–2100.

SUPPLEMENTARY INFORMATION: In 1985, the Grand Resource Area RMP left the majority of the

public land currently administered by the Moab Field Office as "Open to Off-road Vehicle Use."

Since publication of the plan, specific public land areas administered by the Moab Field Office have become destinations for travel by off-road vehicles users and mountain bikers.

Cross-country travel off established roads and trails by motorized vehicles and mountain bikes is causing damage to scenic, cultural, soil, vegetation, and wildlife habitat resources in the high use areas identified below and, in some cases, is causing or threatens to cause considerable adverse effects to those resource values. Short-cutting, making parallel routes, detouring around challenging segments, and widening routes threaten the integrity of existing routes, reduce their value for commercial recreation and special events, and make them less attractive for recreation use. The proliferation of multiple routes off long established roads and trails also contributes to confusion among users as to their location on the ground and has led to more frequent search and rescue activity.

On several historic, interpretive, or recreational single-track trails, certain uses are incompatible with the protection of significant resource values or involve safety or management concerns. Specific actions are necessary to manage these routes.

New Travel Restrictions, Moab Travel Management Area (MTMA)

Travel by ORV's and mountain bikes, on public land in five areas administered by the Moab Field Office, is now limited to existing roads and trails, except where more restrictive designations apply as described below under Existing Designations. Crosscountry travel in these five areas, collectively referred to as the Moab Travel Management Area (MTMA), is prohibited,

except for travel by mountain bike and two-wheel motorcycle on established slickrock riding areas (Bartlett Wash slickrock area, Tusher Canyon slickrock area, and slickrock areas along the Monitor and Merrimac and Lower Monitor and Merrimac trails), where such use does not further disturb vegetation or soils.

To protect public safety and enhance user experience, BLM will provide maps of, and sign and mark recommended routes.

Under this action, approximately 245,642 acres currently designated as Open to ORV travel will be managed as ORV and mountain bike Travel Limited to Existing Roads and Trails. This change involves 25 percent of the land currently Open to ORV use and 13 percent of the total public land within the Moab Field Office. The intent of these year-round ORV designation changes is to protect natural resource and scenic values from the adverse effects of cross-country travel, maintain the integrity of established travel routes, and provide for public safety until the RMP is revised.

MTMA 1 (approximately 15,031 acres, in 3 parcels) is northwest of Moab along the boundary of Arches National Park. It includes all public land south of Township 22 S, west of Arches National Park, east of U.S. Highway 191 and north of the private land at the mouth of Moab Canyon.

MTMA 2 (approximately 189,939 acres) is northwest of Moab. It includes all public land west of U.S. Highway 191; south of the Canyonlands Field Airport, the Mancos shale land already limited to existing roads and trails, the Levi Well Road, and the Tenmile Point Road; east of the public land already limited to existing roads and trails along the east side of the Green River rims, and north of the northern boundary of Canyonlands

National Park, the block of State and Private land around Dead Horse Point State Park and Potash, and the land north of Utah Highway 279.

Land inside this boundary (in South Sevenmile Canyon and the Colorado Riverway), where ORV travel is already limited to designated roads and trails remains so designated.

MTMA 3 (approximately 28,266 acres) is west and south of Moab. It includes all public land west of U.S. Highway 191; north of the southern rim of Kane Creek Canyon and the land on Hatch Point already designated as limited to existing roads; and east and south of the Colorado River. Land in the Behind the Rocks Wilderness Study Area (WSA), which is closed to ORV use (subject to valid existing rights), and within the Colorado Riverway, where ORV use is limited to designated roads and trails, remains so designated.

MTMA 4 (approximately 6,558 acres) is northeast of Moab along the Entrada Bluffs Road. It includes an area bounded on the south by a one-half mile wide corridor along County Road 105 (Entrada Bluffs Road) and on the north by land already limited to existing roads and trails along the Dolores River.

MTMA 5 (approximately 5,848 acres) is northeast of Moab along the Utah/Colorado border. The area, which includes May Flat, is approximately 8 miles long and 2 miles wide. It is bordered by areas where ORV travel is currently limited to existing roads and trails on the north and west; private land to the southwest; the Colorado River on the south, and the Colorado-Utah state line near Rabbit Valley on the east.

Interpretive Trails Closed to Motorized and Mountain Bike Travel

The Sauropod Dinosaur Trackway Interpretive Trail, and the Mill Canyon Dinosaur Interpretive Trail are

closed to motorized travel and mountain bike use to prevent resource damage to paleontological resources, scenic values, vegetation, and soils.

Single-Track Trails Closed to Motorized Travel

The following single-track trails are closed to motorized travel to prevent further damage to scenic values, soils, and vegetation along these narrow trails and to provide for public safety: (1) The entire Portal Trail from Jaycee Park to the top of Poison Spider Mesa; (2) the Hunter Canyon Rim Trail from the drill hole at the end of the Hunter Canyon Rim ORV route to the Kane Creek Road; (3) the Hidden Valley Trail from its trailhead in Spanish Valley to the boundary of the Behind the Rocks WSA.

Implementation

Maps showing all current Moab Field Office ORV designations are available for public review at the Moab Field Office. The designations are also shown on a map on the Moab Field Office's website at *http://www.blm.gov/utah/moab.* BLM will provide public land users with information about travel restrictions using brochures, signs, and bulletin boards with maps at major entry areas. It will protect key areas from further cross-country travel using signs and simple barriers as appropriate.

Enforcement actions will be taken as necessary. BLM will provide maps of, and mark and sign recommended routes.

Future Planning

These travel restrictions are an interim measure to protect resource values and route integrity by prohibiting cross-country use and use on the specific single-track trails identified above until the RMP is revised. Revision of the RMP will address long term

travel management across a range of management options.

Existing Designations

Except for those formerly Open areas where travel is now Limited to Existing Roads and Trails, this notice does not change the ORV designations made through the RMP or previously published **Federal Register** travel notices covering the public land administered by the Moab Field Office.

These designations are affirmed and described below. The travel designation map on the Moab Field Office website shows all applicable travel designations.

Closed Areas

The Behind the Rocks Wilderness Study Area, Negro Bill Canyon, and the east side of Westwater Canyon are closed to ORV use subject to valid existing rights. The Windwhistle and Hatch Point Campgrounds, the Canyonlands, Needles, and Anticline Overlooks, and the Onion Creek sensitive plant site are closed to ORV use off developed roads. The Black Ridge Wilderness Area is also closed to ORV and mechanized travel by act of Congress through the Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000.

Limited to Designated Roads and Trails Areas

ORV Travel in the Mill Creek and East Mill Creek areas and the Colorado Riverway is limited to designated routes. ORV and mountain bike travel in the Sand Flats Recreation Area, the Kens Lake area, the Sevenmile Canyon area, and the NW 1/4 of Section 24 and the SW 1/4 of Section 13, T. 25 S., R. 20 E. S.L.M. in the Little Canyon area is limited to designated routes.

Limited to Existing Roads and Trails Areas

The 1985 RMP designated the Mancos shale areas in the Cisco and Green River desert areas; the Colorado, Green, and Dolores river corridors; portions of the Canyon Rims Recreation Area, and the area between Dead Horse Point State Park and the Colorado River as limited to existing roads and trails.

Exceptions

The travel restrictions in this notice do not apply to wheelchairs, water craft, military, fire, emergency, or law enforcement vehicles used for emergency purposes, vehicles expressly permitted by the BLM, or BLM vehicles required for official use, and are subject to valid existing rights.

Authority: Pub. L. 94–579, E. O. 11644, E. O. 11989, 43 CFR 8341.2, 43 CFR 8364.1

Dated: January 12, 2001.

Sally Wisely,

State Director.

[FR Doc. 01–1595 Filed 1–19–01; 8:45 am]

BILLING CODE 4310–DQ–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–020–03–1220–MA]

Notice of Limitations of Off Road Vehicles (ORV) Use on Public Lands

AGENCY: Department of the Interior, Bureau of Land Management.

ACTION: Notice of Limitations of ORV Use on Public Lands.

SUMMARY: Notice is hereby given that effective immediately, the Bureau of Land Management (BLM), Salt Lake Field Office, revokes the seasonal Notice of Closure of Public Lands published on April 27, 1999 (64 FR 22639 (1999)) and the Notice of Closure of Public

Lands published on March 28, 2000 (65 FR 16410 (2000)). Notice is hereby given that effective immediately, ORV use in the following five areas of Box Elder County is limited to designated routes:

Devils Playground (9838 acres), Grouse Creek Mountains (52493 acres), Hogup Mountains (51698 acres), Pilot Mountains (62654 acres), and Wildcat Hills (12640 acres). The remaining public lands in Box Elder County will be managed according to the Box Elder Resource Management Plan. This limitation will remain in effect until the considerable adverse effects giving rise to this limitation are eliminated and measures are implemented to prevent recurrence of these adverse effects.

FOR FURTHER INFORMATION CONTACT: Brad Palmer, Assistant Field Office Manager, Salt Lake Field Office, Bureau of Land Management, 2370 South 2300 West, Salt Lake City, Utah, 84119; (801) 977–4300.

SUPPLEMENTARY INFORMATION: BLM is implementing this action on 189,323 acres of public land in Northwest Utah.

BLM is limiting ORV use in five areas of Box Elder County to designated routes. BLM's Salt Lake Field Office has observed considerable adverse effects from ORV use in these areas, including proliferation of new ORV routes, damage and destruction of vegetation, increased soil erosion, and a likelihood of damage to cultural resources. Based on this information, the authorized officer determined that ORV use in these five areas is causing, or will cause, considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, and other authorized uses.

Consequently, in these five areas ORV use is now limited to designated routes.

This does not apply to:

1. Any federal, state or local government law enforcement officer engaged in enforcing this closure notice or member of an organized rescue or fire fighting force while in the performance of an official duty.

2. Any BLM employee, agent, contractor, or cooperator while in the performance of an official duty.

This order shall not be construed as a limitation on BLM's future planning efforts or ORV designations. BLM will periodically monitor resource conditions and trends in each of these five areas and may modify this order or implement additional limitations as necessary. A map showing the areas and designated routes is available at the above address.

The authority for this order is 43 CFR 8341.2.

Dated: April 3, 2003.

Glenn A. Carpenter,

Field Office Manager.

[FR Doc. 03–10221 Filed 4–23–03; 8:45 am]

BILLING CODE 4310–$$–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–069–08–1220–00]

Notice of Recreation Use Restrictions for Indian Creek Canyon Corridor

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of recreation use restrictions for Indian Creek Canyon Corridor.

SUMMARY: This notice places restrictions on recreation and vehicle use of the Indian Creek Canyon Corridor and adjacent canyons in the San Juan Resource Area in southeast Utah.

Actions are implemented under the authority of 43 CFR 8341, 8364, 8365, and 8372.

FOR FURTHER INFORMATION CONTACT: Robin Fehlau, San Juan Resource Area, P.O. Box 7, Monticello, Utah 84535 at (435) 587–2141.

SUPPLEMENTARY INFORMATION: Increased recreation use of certain public lands in the Indian Creek Canyon Corridor has adversely impacted riparian areas, vegetation, soil, visual, and cultural resources and poses a threat to public safety and enjoyment of these lands.

Maps of the areas where these special rules and restrictions apply will be available at the San Juan Resource Area Office.

To reduce damage to natural and cultural resource values and provide for public safety in the Indian Creek Canyon Corridor including Lavender Canyon, Davis Canyon, Harts Draw, Lockhart Basin, and Lockhart Canyon:

(1) Motor vehicle and mountain bike travel is restricted to existing roads and trails and indiscriminate damage by off highway vehicle play will be rehabilitated; (2) camping is restricted to either improved recreation sites with facilities for overnight use or designated undeveloped campsites; (3) campsite occupancy may be limited to posted numbers of vehicles and persons, (4) woodgathering within one half mile of a motorized route will be prohibited, (5) campfires within one half mile of a motorized route may only be built in BLM constructed fire rings, designated fire rings or fire pans.

EFFECTIVE DATES: These restrictions are effective as of this date and shall remain in effect pending the completion of the Indian Creek Canyon Corridor Recreation Plan or until updated by the authorized officer.

Dated: December 16, 1997.

Kent Walter,

Area Manager.

[FR Doc. 97–34187 Filed 12–31–97; 8:45 am]

BILLING CODE 4310–DQ–P

A. General. All Internally or externally proposed actions on or affecting public lands or resources under BLM jurisdiction must be reviewed for NEPA compliance. The first step in the NEPA process is to screen the proposed action in order to determine the appropriate response for ensuring NEPA compliance. Proposed actions fall into one of five categories:(1) actions which are exempt from NEPA; (2) actions which are categorically excluded; (3) actions which are covered by an existing NEPA environmental document; (4) actions which require preparation of an environmental assessment (EA) to determine if an environmental impact statement (EIS) is needed; or (5) actions which require preparation of an EIS. The NEPA procedural and documentation requirements are different for each category. Each category is briefly defined below. A flow chart depicting the screening process is shown in Illustration

B. Actions Which Are Exempt From NEPA. There are three major types of actions which are exempt from NEPA procedural or documentation requirements:

1. Congressionally Exempt Actions. Some actions are Congressionally exempt, from NEPA compliance. Such actions are listed in Appendix 2.

2.Emergency Actions. Certain emergency circumstances which require immediate action, though they may have significant environmental impacts, are exempt from CEQ's regulatory provisions for implementing NEPA (40 CFR 1506.11). In the event of such an emergency, agencies must consult with CEQ. Guidance on such consultation is discussed in 516 DM 5.8.

3. Rejections of Proposed Actions.A proposed action may be rejected under another statutory or regulatory

authority without NEPA review. For example, a proposed action may be rejected on the basis that it is not within the BLM's authority to approve or is not in conformance with the applicable land use plan and is judged not to warrant further consideration.

C. Actions Which Are Categorically Excluded. Actions that are included on the lest of categorical. exclusions (516 DM 2, Appendix 1 and 516 DM 6, Appendix 5) and that are found through review not to meet any of the ten exceptions to categorical exclusion (516 DM 2, Appendix 2) do not need to be addressed in an EA or EIS (see Chapter II).

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Salt Lake District Office
***

In Reply Refer to: 8342/8321 (UT-934)P

Instructions Memorandum No. UT 2004-061
(Expires: 09/30/2005)

To: AFOs

Attention: Outdoor Recreation Planners, Land Use Planners

From: State Director

Subject: Designation Off Highway Vehicle Routes in the Land use Planning Process

Program Area: Off Highway Vehicles (OHV) and Land Use Planning

Purpose: Provide clarification and additional guidance for OHV route designation decisions the land use planning process.

Background: Both Executive Order 12608 and the Code of Federal Regulations (43 CFR part 8340) require BLM to designate all public lands as Open, Closed or Limited for Off Highway Vehicle use. These designations are made in Resource Management Plans (RMPs) or in plan amendments. For areas in the Limited category, BLM also determines route designations, e.g., specific routes available for OHV

travel.

***

[8]of pollution, erodible soils, stream sedimentation, non-point source water pollution, listed and sensitive species habitats, historic and archeological sites, wildlife, special management areas, grazing operations, fence and gate security, needs of non-motorized recreationists, and recognition of property rights for adjacent landowners;

Public land roads or trails determined to cause considerable adverse effects or to constitute a nuisance or threat to public safety would be considered far relocation or closure and rehabilitation after appropriate coordination with applicable agencies and partners.

There are times when unexpected emergencies arise. Under certain conditions BLM has the authority to immediately close or restrict motorized use. This authority is found in 43 CFR 8341.2 Special Rules:

Notwithstanding the consultation provisions in § 8342.2(a), where the authorized officer determines that off road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources, the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence. Such closures will not prevent designation in accordance with procedures in Subpart 8342 of this part, but these lands

shall not be opened to the type(s) of off-road vehicle to which it was closed unless the authorized officer determines that the adverse effects have been eliminated and measures implemented to prevent recurrence.

(b) Each State director is authorized to close portions of the public lands to use by off road vehicles, except those areas or trails which are suitable and specifically designated as open to such use pursuant to Subpart 8342 of this part.

Time Frame: This IM is effective immediately.

Budget Impact: Each Field Office should identify their annual budgetary needs for implementing OHV designation decisions in the Bureau's Budget Planning System (BPS). These BPS submissions should include funding necessary for signing, travel map preparation and distribution, information kiosks, brochure preparation and printing, road closures, public education and route monitoring.

Contact: Robin Fehlau, Trails and OHV Coordinator, (801) 539-4233.

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(3)

No. 06-1144

Supreme Court, U.S.
FILED
MAR 19 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE,

Petitioner,

v.

GLENN CARPENTER, IN HIS CAPACITY AS MANAGER OF THE SALT LAKE FIELD OFFICE OF THE BUREAU OF LAND MANAGEMENT, ET AL., AND SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, in the absence of an emergency, the BLM may apply FLPMA section 302(b)'s "prevent unnecessary or undue degradation" provision to eviscerate FLPMA section 202's public participation mandate and FLPMA section 302(a)'s management conformance mandate?

Amicus proposes adding a second question:

2. Whether the BLM must comply with the procedural requirements of NEPA sections 102(C) and (E) when issuing closure orders that are "major federal actions significantly affecting the quality of the human environment?"

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the National Environmental Policy Act ("NEPA"), are implemented and enforced in a manner intended by Congress and consistent with the Constitution of the United States. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

proper interpretation and application of NEPA. *E.g., Park County Resource Council, Inc. v. U.S. Dep't of Agriculture*, 817 F.2d 609 (10th Cir. 1987) (*amicus curiae*); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (represented intervenor-appellants); *New Mexico v. BLM*, 459 F.Supp.2d 1102 (D.N.M. 2006) (represents intervenor-defendant).

SUMMARY OF THE ARGUMENT

In enacting NEPA, Congress intended the Federal government to work cooperatively with state and local governments and concerned members of the public when analyzing the environmental considerations of government decision making. To this end, a Federal agency must comply with section 102(2) of NEPA and prepare an Environmental Impact Statement ("EIS") or an Environmental Analysis ("EA") whenever a federal agency proposes "major Federal action significantly affecting the quality of the human environment." Contrary to this express statutory language, the Bureau of Land Management ("BLM") did not prepare an EIS or an EA, failed to consider a range of alternatives, and failed to afford affected members of state and local government and the public an opportunity to comment on BLM proposals that "significantly affect[ed] the quality of the human environment." The Tenth Circuit erred when it failed to address whether the BLM's proposals required compliance with NEPA and failed to require BLM to prepare an EIS or EA prior to implementing its proposals.

REASONS FOR GRANTING THE PETITION

I. NEPA MANDATES COMPLIANCE FOR PROPOSED "MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT."

A. The Background of NEPA.

In 1969, Congress enacted NEPA, declaring national policy to "use all practicable means and measures, . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). Section 102(2) of NEPA requires that an Environmental Impact Statement ("EIS") be completed by "all agencies of the Federal Government . . . on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(A)-(C). Congress, however, did not define these terms.

The Council on Environmental Quality ("CEQ"), which was created by Section 202 of NEPA, has promulgated regulations to implement NEPA. 42 U.S.C. § 4342; *see* 40 C.F.R. 1500.1-1508.28. Moreover, pursuant to Executive Order, all federal agencies must comply with CEQ regulations. Exec. Order No. 11,991 § 2, 3 C.F.R. §§ 1966-1970 (1977); *see* 40 C.F.R. § 1500.3. CEQ has defined the statutory terms that were not defined by Congress. *See* 40 C.F.R. §§ 1502.3, 1508.3, 1508.8, 1508.14, 1508.17, 1508.18, 1508.23, 1508.27. Thus, CEQ regulations provide that a " 'Proposal' exists at that stage in the development of an action when an agency . . . has a goal and is actively

preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." *Id.* § 1508.23. Additionally, a "'Major Federal action' includes action with effects that may be major and which are potentially subject to Federal control and responsibility." *Id.* § 1508.18. "Major Federal action" also includes "new and continuing activities," as well as "new or revised agency rules, regulations, plans, policies, and procedures." *Id.* "Major reinforces but does not have a meaning independent of significantly." *Id.* "Significantly . . . requires considerations of both context and intensity." *Id.* § 1508.27. "[C]ontext" requires consideration of "society as a whole, the affected region, the affected interests, and the locality." *Id.* "[I]ntensity" "refers to the severity of the impact" and requires consideration of the following: (1) "impacts that may be both beneficial and adverse"; (2) "unique characteristics of the geographic area"; (3) "the degree to which the effects on the quality of the human environment are likely to be highly controversial"; (4) "the degree to which the action may establish a precedent for future actions with significant effects." *Id.* Furthermore, CEQ defines "affecting" as "will or may have an effect on," including direct and indirect effects. *Id.* §§ 1508.27, 1508.8. Finally, CEQ regulations provide that "'Human Environment' shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." *Id.* § 1508.14.

If an agency is unsure whether a proposed action requires an EIS, an environmental assessment ("EA") must be prepared. *Id.* § 1507.3(b)(2)(iii). An EA includes discussions of the need for the action, alternatives, and environmental effects of the proposal and alternatives. *Id.*

§ 1508.9. Based upon the EA, an agency may then decide to prepare an EIS or may issue a finding of no significant impact ("FONSI"), which obviates the need for an EIS. *Id.* § 1508.13. When an EIS is necessary, agencies are required to open a comment period on the draft EIS to the public and state and federal agencies with jurisdiction over and expertise in the subject matter. *Id.* § 1503.1. After consideration of these comments, a final EIS is published. CEQ regulations stress that "it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork . . . but to foster excellent action." *Id.* § 1500.1(c).

B. The Policy of NEPA.

As Justice Thomas determined in *Department of Transportation v. Public Citizen*, the primary purpose of an EIS is to inform agency decision making. 541 U.S. 752, 768 (2004). CEQ regulations, however, suggest a much broader purpose, that is, information sharing. For example, agencies preparing an EIS must include "reasonable alternatives not within the jurisdiction of the lead agency," 40 C.F.R. § 1502.14, to inform other agencies and to foster interagency discussion concerning the range of alternatives. In fact, the District of Columbia Court of Appeals, in *Natural Resources Defense Council, Inc. v. Morton*, noted that NEPA was intended to provide a basis for discussion among executive decision makers. 458 F.2d 827 (D.C. Cir. 1972), restricted by *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *see Dept. of Transp.*, 541 U.S. at 768.

Additionally, NEPA creates a forum for public involvement and ensures that the public is aware of the

environmental consequences of government proposals. For example, CEQ regulations require agencies preparing an EIS to make "diligent efforts" to involve the public throughout the process. 40 C.F.R. § 1506.6. As Justice Thomas, writing for the Court, held in *Department of Transportation*, the "'informational role' of an EIS is to 'give the public the assurance that the agency has indeed considered environmental concerns in its decision making process' and, 'perhaps more significantly, provide a springboard for public comment' in the agency decision making process itself." 541 U.S. at 768-769 (internal citations omitted).

II. THE BLM CLOSURE ORDERS AT ISSUE ARE "PROPOSALS FOR [] MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT."

A. This Court Interprets NEPA Section 102(c) as Requiring Agencies to Prepare an EIS or EA in Cases Such as This.

This Court held, in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983), that Section 102(c) of NEPA is triggered when there is a "reasonably close causal relationship between a change in the physical environment and the effect at issue" and that NEPA requires considerations of the effects of present physical actions and the ramifications of possible future outcomes on the environment. *Id.* at 774, 779.

B. The Tenth Circuit Erred in Rejecting Petitioner's NEPA Claim Without Answering the Threshold Question of Whether NEPA Applies.

The Tenth Circuit "reject[ed]" Petitioner's NEPA argument without answering the threshold question of whether NEPA applies to the BLM proposals, *Utah Shared Access Alliance*, 463 F.3d at 1136, notwithstanding that the BLM's closure orders are precisely the type of agency actions that trigger NEPA compliance. Although the Tenth Circuit discussed NEPA and determined correctly that:

> NEPA requires all agencies that propose a "major federal action" that significantly affects the quality of the environment to prepare an [EIS] that describes the 'environmental impact of the action; unavoidable adverse environmental effects; alternatives to the action; relationship between the short-term uses and long-term productivity of the affected environment; and irretrievable and irreversible commitments of resources should the action be implemented,

and that an EA and/or EIS is required when a Resource Management Plan ("RMP") is amended, *id.* at 1131, the Tenth Circuit failed to address whether the BLM's proposal to close vast amounts of federal land to public access triggered NEPA.

That the BLM's proposals constitute "major federal actions" for purposes of NEPA § 102(C) is apparent from the BLM's closure order:

> Notice is hereby given that effective immediately, the Bureau of Land Management (BLM), Salt Lake Field Office, revokes the seasonal Notice of Closure of Public Lands published on April 27,

> 1999 and the Notice of Closure of Public Lands published on March 28, 2000. Notice is hereby given that effective immediately, [Off Road Vehicle] use in the following five areas of Box Elder County is limited to designated routes: Devils Playground (9838 acres), Grouse Creek Mountains (62654 acres), and Wildcat Hills (12640 acres). The remaining public lands in Box Elder County will be managed according to the Box Elder Resource Management Plan.

App. to Pet. Cert. at 104a. (internal citations omitted). Thus, with its closure order, the BLM revoked seasonal closures and replaced them with a permanent closure affecting hundreds of miles of roads throughout a vast region of Utah.

Although CEQ regulations set forth four types of proposed federal actions that trigger NEPA, to wit, policies, plans, programs, and projects, 40 C.F.R. § 1508.18(b), that list is not all inclusive. In fact, CEQ regulations provide that a "'[p]roposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." *Id.* § 1508.23. The BLM closure order clearly falls into this category. The BLM had as its "goal" a plan to close certain roads and was "actively preparing to make a decision on" a "means of accomplishing that goal"; moreover, that "goal" had "effects" [on "the human environment"] that "[could have been] meaningfully evaluated." The BLM, however, refused to comply with NEPA in that it neither considered other alternatives and their effects on the environment nor permitted public participation.

With its closure order, the BLM "significantly" affected the "human environment" by denying public access to hundreds of miles of roads for a host of activities in which the American public, the people of Utah, and units of government there had an interest. Those lawful activities included, but were not limited to, off road vehicle recreation, energy exploration and development, hunting, fishing, hiking, and camping, and mineral entry.

This closure order is "significant" because it affects not only this region in Utah, but also the remainder of the country due to the vast range of user-groups affected. Additionally, the impacts of the closure order were both beneficial and adverse. While the BLM alleges the closure was for the benefit of the environment, the order includes adverse effects for the affected user-groups. The "significan[ce]" of the BLM's closure order is revealed further by the unique characteristics of the geographic area affected. This region of Utah, which is not only unique in the United States but also contains one of the highest densities of public land available for multiple uses, is immensely popular among a number of diverse user-groups. That is, multiple user-groups frequent these areas specifically for the unique characteristics of this geographic area and the inherently unique recreational opportunities afforded. As a result, any proposal that affects the quality of the human environment in this geographic area is highly controversial; this litigation is but one small indication of the volatility of such proposals. This closure order is also "significant" because of the highly controversial nature of the resulting effects to the human environment. Evidence of this is again found in the litigation leading to this petition for *Certiorari*.

The "significance" of this closure order is found further in the precedent BLM has established and the resulting significant effects. Failing to require NEPA compliance in this instance allows the BLM, and other agencies, to take agency action in a vacuum. This is not the purpose of NEPA; NEPA acts as a check on agency action by allowing political, public, and personal interests a window into agency action. This public forum is not discretionary and in this case, BLM compliance was mandatory.

Nonetheless, at no time prior to its implementation of its closure order did the BLM publish a range of alternatives to its closure order, analyze the immediate and cumulative environmental impacts of the closure order, or permit the public to comment on the closure order. Even if an EIS had not been required, the BLM was required to adhere to section 102(2)(E) of NEPA, which requires the agency to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Therefore, at minimum the BLM was required to prepare an EA. Even this, the BLM refused to do.

III. THE TENTH CIRCUIT'S HOLDING HAS WIDE IMPLICATIONS ON PUBLIC LANDS THROUGHOUT THE CIRCUIT.

The Tenth Circuit's failure to apply NEPA as required by federal law and this Court's precedents, will allow all federal land management agencies through the states of Utah, New Mexico, Colorado, Wyoming, Kansas, and Oklahoma including the BLM, the U.S. Forest Service, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Reclamation, and the U.S. Department of

Defense, for the first time since 1969, to propose and implement "major federal action [] significantly affecting the quality of the human environment" without NEPA compliance. Millions of acres of federal land, managed by these federal agencies, lie within these four states; furthermore, the controversial nature of the types of activities, such as oil and gas development, permitted on these lands compels proper application of NEPA.

Given the refusal of the Tenth Circuit to interpret the law in accordance with the requirements of the holdings of this Court, the Petition should be granted.

IV. THERE IS A SPLIT IN THE CIRCUITS AS TO WHETHER AN EIS IS REQUIRED WHEN PROPOSED AGENCY ACTION PURPORTEDLY BENEFITS THE ENVIRONMENT.

As the Tenth Circuit noted below, there is a split in the circuits as to whether an EIS is required when proposed agency action purportedly benefits the environment. *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 n.4 (10th Cir. 2006) For example, the Fourth Circuit, in *Virginians for Dulles v. Volpe*, 541 F.2d 442, 445 (4th Cir. 1976), held that a change in airport hours of operations and flight patterns, which plaintiffs maintained would benefit the environment, fell within the scope of NEPA and required an EIS. However, the Ninth Circuit, in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), held that "[a]n environmental assessment or an environmental impact statement is not necessary for federal actions that conserve the environment." *Id.* at 1505. Given this split in the Circuits, this Court should grant the petition to resolve the issue.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant the Petition for *Certiorari* in order to determine whether BLM must comply with procedural requirements of NEPA section 102 when issuing closure orders that are "major federal actions significantly affecting the quality of the human environment."

Respectfully submitted,

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IN THE

Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, PETITIONER

v.

GLENN CARPENTER, IN HIS CAPACITY AS MANAGER OF THE SALT LAKE FIELD OFFICE OF THE BUREAU OF LAND MANAGEMENT, ET AL., AND SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION

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UTAH SHARED ACCESS ALLIANCE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE UTAH ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Utah Association of Counties ("UAC") is a voluntary, state-wide organization operated by the 29 counties of Utah. Formed in 1924, UAC assists county commissioners and other county officials by lobbying for

federal and state legislation and administrative action and at times litigating for judicial decisions and outcomes that are beneficial to the counties of Utah and county residents.[1] Public lands management is one of the core areas wherein UAC provides these services.

The BLM's more than 22 million acres of land in Utah make up nearly half of the State's geographic area. Nineteen of Utah's 29 counties have significant amounts of BLM land within their borders. These 19 counties are vitally interested in how BLM puts its lands and resources to use. They and the State of Utah have unique roles as state and local government "cooperating agencies" with BLM in developing, revising and amending BLM RMPs. 43 U.S.C. § 1712(c)(9), 43 C.F.R. §§ 1610.0-2, 1601.0-5(e), 1610.0-5(h). These counties have a valid, legally binding expectation that the BLM will coordinate its public lands inventory, planning and management activities with those of the counties wherein the lands are located, 43 U.S.C. § 1712(c)(9), and that the BLM's RMPs will be consistent with applicable county land use plans to the maximum extent the Secretary of Interior finds consistent with Federal law and the purposes of FLPMA. *Id.*, 43 C.F.R. §§ 1610.3-1(d)(1), 1610.3-2(a).

These 19 counties participate in rulemaking, decisionmaking and planning with respect to BLM lands. 43 U.S.C. §§ 1702(d), 1712(a), 43 C.F.R. § 1601.0-8. They

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[1]Pursuant to Supreme Court Rule 37.6, UAC states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than UAC, contributed monetarily to the preparation and submission of this brief.

are entitled to adequate notice and opportunity to comment upon and participate in the formulation, preparation and execution of plans and programs relating to the management of public lands. 43 U.S.C. §§ 1712(f), 1739(e). This participation requirement applies fully to RMP plan amendments. 43 C.F.R. §§ 1601.0-8, 1610.2(a), 1610.2(g), 1610.3-1(b).

The level and extent of county involvement in the preparation of RMPs and amendments thereto must be at least equal to the level and extent required under the National Environmental Policy Act ("NEPA"). 42 U.S.C. §§ 4321, *et seq.*, and associated implementing regulations, 43 C.F.R. § 1610.2(a). NEPA policy encourages and facilitates public involvement in any decision which affects the quality of the human environment. 40 C.F.R. § 1500.2(d).

These 19 counties also have an expectation that BLM orders, like those at issue in this case, which were carried out pursuant to 43 C.F.R. § 8341.2(a) and essentially amount to the "designation and redesignation of trails," will be carried out "through the resource management planning process described in part 1600 of this title," 43 C.F.R. § 8342.2(a), which process also applies to RMP amendments by virtue of 43 C.F.R. § 1610.3-1(b).

In sum these 19 counties are statutorily and administratively recognized as key players who help determine how BLM RMPs will strike a balance among the many competing uses to which Utah BLM lands can be put, whether at the formulation, revision or amendment stages of an RMP. Accordingly, these counties have a vital interest in seeing that BLM RMPs,

once approved, *are adhered to* in BLM's management practices during the life of the RMP, unless those RMPs are properly amended or revised pursuant to the provisions cited above.

This is not a passing academic interest. Most BLM RMPs in Utah are currently undergoing their first major revision in decades. As major players in this RMP revision process, these 19 Utah counties have to know that their years of RMP revision work, once complete, will result in an RMP that may be changed only through a NEPA-compliant public plan amendment process as opposed to the summary actions, no matter how well intentioned, of BLM field office personnel with no public input.[2] The heart of FLPMA and NEPA for UAC and its members is the cooperating agency public participation process. These 19 counties do not want to see that process frittered away and turned on its head by piecemeal summary BLM management decisions done in the name of "undue degradation prevention." That is why UAC, the main collective voice for these 19 counties in working with the BLM, is filing this *amicus curiae* brief in support of the petition.

The petitioner in this case is an off-highway vehicle ("OHV") advocacy group. UAC, however, takes no position on how much unrestricted OHV travel should or

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[2]Counties in other public lands states throughout the West also need this clarification, as many are in their own BLM RMP revision process. *See* web page entitled "Planning U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT National Land Use Planning," from BLM's national website of March 17, 2007 at *http://www.blm.gov/ wo/st/en/prog/planning. print.html*, saved in printable format and reprinted in the Appendix hereto at UAC 1a.

should not occur on the lands at issue in this case. UAC simply wants the public plan amendment process to be the vehicle for solving this and other public lands resource issues.

UAC has no financial interest in the outcome of this case. UAC is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT

This case involves two BLM RMPs in Utah, one adopted in 1985 known as the Grand RMP for Grand and part of San Juan Counties, and one adopted in 1986 known as the Box Elder RMP for Box Elder County. T1471, T0839.[3] Both RMPs are still in effect today and both have designated vast amounts of BLM acreage as "open" to OHV and other motorized and motor-assisted uses. For the lands at issue in this case, those "open" designations have never been the subject of a formal public RMP plan amendment process. Thus those designations are still in effect today pursuant to *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004).

The 1999 so-called BLM statewide policy goal to change RMP categories from "open" to "limited to designated roads and trails" (hereafter "1999 BLM Policy Goal"), T1245, T1722, was not promulgated by virtue of an RMP plan amendment process or other NEPA process.

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[3]References to the Tenth Circuit Appendix are "T__." References to the Petitioner's Appendix are "__a."

No plan revision or plan amendment procedures of FLPMA and its implementing regulations were employed. No environmental impact statement or environmental assessment was prepared. No FLPMA sanctioned and mandated cooperating agency process was undertaken.

The 1999 BLM Policy Goal contravened the Grand and Box Elder RMPs. Those RMPs designated certain lands as "open" to OHV use, and the Policy Goal said otherwise. BLM gave as the substantive justification for the 1999 BLM Policy Goal, its duty under 43 U.S.C. § 1732 to "prevent unnecessary and undue degradation." T3074. As a procedural matter, however, BLM *never once ran its undue degradation concerns through the cooperating agency public RMP plan amendment process, like FLPMA and NEPA demand it must do before contradicting an approved RMP.* To UAC's knowledge, since 1999 the BLM has not initiated such a process in order to reconcile the Grand and Box Elder RMPs and their "open OHV" designations, with the 1999 BLM Policy Goal which squarely repudiates those designations. In the tradition of the Old West, this amounts to an extra-legal stand-off now eight years in the making.

Ratcheting up this stand-off are the extant 2001 Grand County orders, 94a and 98a, and 2003 Box Elder County order, 104a, which repudiate earlier classifications of the Grand and Box Elder RMPs on a quarter million acres in Grand County and 189,000 acres in Box Elder County. Petitioner's Statement 5-6. All three orders were admitted efforts by BLM to implement the 1999 BLM Policy Goal. The Grand and Box Elder RMPs said yes to "open" OHV travel on several hundred thousand acres of land. The Grand County orders and Box Elder

County order said no to "open" OHV travel on that acreage.

None of the orders claimed an emergency, and they are hardly temporary. The 2001 Grand County orders both state that they shall remain in effect "until modified or the RMP is amended." 94a, 98a. The 2003 Box Elder County order remains in effect "until the considerable adverse effects giving rise to this limitation are eliminated and measures are implemented to prevent recurrence of these adverse effects." BLM gave the same substantive justification for these orders: They were driven by the requirement of 43 U.S.C. § 1732 to "prevent unnecessary and undue degradation." Again, however, BLM never ran its undue degradation concerns through the cooperating agency public RMP plan amendment process, like FLPMA and NEPA demand it must do before contradicting an approved RMP. To UAC's knowledge, in the six years that have elapsed since BLM issued the Grand County orders and the nearly four years that have elapsed since BLM issued the Box Elder County order, the BLM has not initiated such a process in order to reconcile the Grand and Box Elder RMPs and their "open OHV" designations, with the subject orders which squarely repudiate those designations.

In affirming the dismissal of petitioner's lawsuit against the BLM, the Tenth Circuit rejected petitioner's claim that the undue degradation clause of 43 U.S.C. 1732(b) cannot interfere with the BLM's duty to conform its management practices to existing RMPs pursuant to 43 U.S.C. 1732(a) unless the BLM undergoes a public FLPMA and NEPA compliant plan amendment process. The Tenth Circuit emphasized that the subject BLM orders fall under the umbrella of two unchallenged BLM

regulations, 43 U.S.C. §§ 8341.2, 8364.1, and related executive orders which appear to rest on the authority of the 43 U.S.C. § 1732(b) unnecessary and undue degradation prevention requirement. *Utah Shared Access Alliance v. Carpenter*, 463 F. 3d 1125, 1135-37 (10th Cir. 2006). However the Tenth Circuit failed to consider whether the BLM was still duty bound to initiate the public RMP plan amendment process to reconcile the tension between the contradictory orders and the RMPs, a tension which this Court said must be reconciled through a formal plan amendment process. *Norton*, 542 U.S. at 69 (2004).

The Tenth Circuit reasoned circularly that the Box Elder and Grand orders did not trigger *Norton's* plan amendment requirements because the orders themselves were not amendments. *Utah Shared Access Alliance*, 463 F.3d at 1135-36. The Tenth Circuit reached this conclusion without commenting on the obvious contradiction between the orders and the RMPs. More to the point, however, the Tenth Circuit reached this conclusion apparently without first consulting the checklist of circumstances which 43 C.F.R. § 1610.5-5 provides shall trigger an RMP plan amendment process.

REASONS FOR GRANTING THE PETITION

1. The Clarifying Direction Needed From This Court

The two core requirements of FLPMA[4], that BLM manage its lands according to its RMPs and not stray

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[4]*The Federal Land Policy and Management Act of 1976*, 43 U.S.C. §§ 1701, *et seq.*

from an RMP without going through a NEPA-compliant[5] public plan amendment process, 43 U.S.C. §§ 1712(a), 1732(a), *Norton*, 542 U.S. at 69 (2004), do not wither and crumble before FLPMA's unnecessary and undue degradation prevention requirement, 43 U.S.C. § 1732(b), like they did in the proceedings below. For the sake of numerous rural counties in Utah and other western states who have recently completed or are still engaged in the RMP revision process, this Court should grant the petition and establish an orderly way for BLM to honor all three requirements. Otherwise the RMP revision process now in full gear throughout the West will appear to many as a thing of naught, for fear that a doctrinaire land manager, no matter how well intentioned, may use the Tenth Circuit decision[6] as a way to immunize against the "distractions of NEPA" whenever the manager runs up against a resource issue that calls for possibly contradicting an RMP.[7]

Given the logical seams that run among FLPMA's equally binding RMP conformance, public plan amendment, and prevent undue degradation requirements, this Court would serve the counties and the BLM well by providing the following clarification in the present controversy:

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[5]*The National Environmental Policy Act of 1969*, 42 U.S.C. §§ 4321 *et seq.*

[6]The controlling authoritative sweep of that decision covers a large percentage of BLM's national acreage.

[7]As if one could just push the nouveau plan-amendment-proof "undue degradation" button and have all RMP plan amendment headaches go away.

a. When undue degradation concerns of a *non-emergency nature* arise, direct that they may lawfully trigger immediate summary orders of indefinite duration that are inconsistent with an RMP, *only after* BLM completes an orderly, NEPA-compliant public plan amendment process to look at whether, for how long and on what conditions the RMP should bend to those inconsistent orders or whether those orders should bend back to the RMP; and

b. When undue degradation concerns of an *emergency nature* arise, direct that they may lawfully trigger immediate summary orders of indefinite duration that are inconsistent with an RMP, *only if immediately followed on* by an orderly, NEPA-compliant public plan amendment process to look at whether, for how long and on what conditions the RMP should bend to those inconsistent orders or whether those orders should bend back to the RMP.

This clarification would save the BLM and its state and county cooperators untold time, grief and uncertainty in trying to sort through the interrelationship among the RMP conformance, the public RMP plan amendment requirement, and the requirement to prevent unnecessary and undue degradation.

2. The Fundamental Difficulty With the Tenth Circuit's Decision

The Tenth Circuit has mistaken the *substantive* requirement of 43 U.S.C. § 1732(b) as license for BLM to disregard FLPMA's and NEPA's core *procedural* mandates concerning cooperating agency and other public review, collaboration and participation in BLM's public

lands management planning and actions, particularly when those actions contradict previously approved bona-fide RMPs. 42 U.S.C. §§ 4321 *et seq.*, 43 U.S.C. §§ 1702(d), 1712(a), 1712(c)(9), 1712(f), 1732(a), 1739(e), 40 C.F.R. §§ 1500.2(d), 1501.7, 1502.9(c), 1503.1, 1503.4, 1506.6, 43 C.F.R. §§ 1610.0-2, 1601.0-5(b), 1601.0-5(c), 1601.0-5(e), 1601.0-5(h), 1601.0-8, 1610.2(a), 1610.2(g), 1610.3-1(a), 1610.3-1(b), 1610.3-1(d)(1), 1610.3-1(e), 1610.3-2(a), 1610.5-5, 8342.2(a).

3. The Tenth Circuit's Critical Disregard For the Effect of 43 C.F.R. § 1610.5-5

The Tenth Circuit decision below, *Utah Shared Access Alliance*, 463 F. 3d at 1135, noted that *House v. U.S. Forest Serv.*, 974 F. Supp. 1022 (E.D. Ky. 1997) and *Or. Natural Res. Council Fund v. Forsgren*, 252 F. Supp. 2d 1088 (D. Or. 2003) required a plan amendment and an EIS when management actions significantly change prior land use plans. The Tenth Circuit, however, purported to distinguish those cases because they did not involve closure orders made pursuant to 43 C.F.R. §§ 8341.2 and 8364.1. But those cases could not have involved those BLM regulations, because they are Forest Service cases. The court should have looked at recent similar BLM cases, for therein the court would have noted another BLM regulation not present in Forest Service cases, a regulation that specifically drives the plan amendment requirement for BLM. That regulation is 43 C.F.R. § 1610.5-5. It operates as a more than sufficient counterweight to §§ 8341.2 and 8364.1.

The Grand County and Box Elder County orders contradict the Grand and Box Elder RMPs enough to trigger the mandatory plan amendment requirement of 43

C.F.R.§ 1610.5-5. That specific provision falls under general provision 43 CFR § 1610.5 entitled "Resource management plan approval, use and modification." 43 C.F.R. § 1610.5-5 states in relevant part:

> A[resource management plan] amendment *shall be initiated* by the need to consider monitoring and evaluation findings, new data, *new or revised policy*, a change in circumstances or a proposed action that may result in a *change in the scope of resource uses* or *a change in the terms, conditions and decision of the approved plan.* An amendment *shall be made* through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in § 1610.2 of this title, *interagency coordination* and consistency determination as prescribed in § 1610.3 of this title and any other data or analysis that may be appropriate.

Emphasis added.[8]

The Grand County and Box Elder County orders issued *pursuant to a new policy*, namely the 1999 BLM Policy Goal. The *scope* of "open" OHV and related camping uses under the Grand and Box Elder RMPs *changed* as a result of the Grand County and Box Elder

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[8]There is no language in 43 C.F.R. § 1610.5-5 that excuses BLM from the plan amendment process just because the changes in policies, terms or conditions make it necessary to "prevent unnecessary and undue degradation."

County orders. And as a result of those orders, the *terms, conditions and decision* of the approved Grand and Box Elder RMPs with respect to "open" OHV and related camping uses, *changed.* Yet the Grand and Box Elder RMPs never changed. They were never amended. Like two proverbial elephants in the kitchen, those RMPs lingered while BLM rode "policy goals" and policy implementing orders around them in 1999 and again in 2001 and 2003. Those circumstances are more than enough to trigger the RMP plan amendment requirement of 43 C.F.R. § 1610.5-5.

Subsequent to the Tenth Circuit decision below, the court in *Silverton Snowmobile Club v. Forest Service*, 433 F. 3d 772, 787 (10th Cir. 2006) noted as follows: That if BLM had ordered a "more than minor" change in RMP-approved snowmobile use, that would have triggered an RMP amendment with the attendant procedures of (1) preparation of an environmental assessment of the proposed action and alternatives as provided in 43 C.F.R. §§ 1610.4-6 and 1610.5-5, (2) full public involvement and opportunity to comment as provided in 43 C.F.R. 1610.2, and (3) complete interagency coordination as required by 43 C.F.R. § 1610.3.

The Ninth Circuit agreed that "BLM *must* amend a management plan when an action is proposed that changes either 'the scope of the resource uses' or the 'terms, conditions and decisions' of the plan." *Klamath Siskiyou Wildlands Center v. Boody*, 468 F. 3d 549, 556 (9th Cir. 2006) (emphasis in original) (holding that FLPMA and NEPA were violated when a 1994 BLM and Forest Service administered forest plan and its 2001 plan amendment that protected the "red tree vole" species with high-priority management, mandatory surveys prior

to any species or habitat disturbing actions, and a mandatory annual species review process, was followed by a BLM 2001 "memorandum" and a 2003 "memorandum" that eliminated the required pre-disturbance surveys and the high priority management altogether). The court rejected BLM's argument that the plan amendment requirements of § 1610.5-5 are inapposite because the memorandums merely "maintained" the earlier plan:

> It is clear the 2001 and 2003 ASR decisions amended the resource management plans. They resulted from the need to consider new information regarding the red tree vole and they changed the terms and conditions of the plans without complying with § 1610.5-5. Therefore, the ASR decisions violated FLPMA.

Id. at 556. The court also rejected the argument that the BLM's memorandums merely "implemented" established BLM policy:

> This argument sounds suspiciously similar to BLM's attempt to define the decisions as plan maintenance actions rather than plan amendments under FLPMA, and it fails for the same reasons: (1) BLM's actions amend, not merely maintain, the resource management plans, and (2) the ASR Decisions were rejected in the 2000 FSEIS. Indeed, for reasons explained in Part IV, *supra*, the ASR decisions changed the resource management plans substantially, and BLM was required to conduct NEPA

> analyses prior to implementing those changes.

Id. at 560.

Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241 (E.D. Cal. 2006) involved an earlier RMP whose objective was to double the area of a certain deer habitat preserve through acquisition of private lands that were checkerboarded in with the subject BLM lands. The RMP was later amended to withdraw that acquisition objective. Though BLM ran the plan amendment through the NEPA environmental assessment process, the Eastern District of California held the process violated NEPA and FLPMA for failure to perform a full environmental review. *Id.* at 1261. The court found unavailing the BLM's argument that the amendment merely continued the status quo and that redrawing of the deer habitat boundary had no environmental consequences. "At a minimum," the court said, "an adequate environmental assessment is necessary to determine whether the amendment may have a significant environmental impact, *inter alia*, on the [existing] management plan." *Id.* *See also id.* at 1269 (citing 43 C.F.R. § 1610.5-5).

Interestingly, the *Soda Mountain Wilderness Council* opinion also demonstrates how the BLM may fulfill the prevent undue degradation prevention requirement of 43 U.S.C. § 1732(b) *in the context and as part of, not to the exclusion or outside of,* the 43 C.F.R § 1610.5-5 required plan amendment process. *See* 424 F. Supp. 2d at 1269-1270.

4. The Tenth Circuit's "De Facto Amendments"

Analysis

43 C.F.R. § 1610.5-5 was likewise not analyzed in any of the BLM cases considered by the Tenth Circuit in its de facto amendments discussion. *Utah Shared Access Alliance*, 463 F. 3d at 1135-36. *See Humboldt County v. United States*, 684 F. 2d 1276, 1283 (9th Cir. 1982), *Am. Motorcyclist Ass'n v. Watt*, 543 F. Supp. 789 (C.D. Cal. 1982), *Sierra Club v. Clark*, 756 F. 2d 686 (9th Cir. 1985), and *Am. Sand Ass'n v. U.S. Dept. Of Interior*, 268 F.Supp. 1250 (S.D. Cal. 2003). In *Humboldt*, and *Am. Motorcyclist*, the opinions issued prior to 1983 when § 1610.5-5 was promulgated. In *Sierra Club*, the facts of that case arose prior to 1983. While *Am. Sand Ass'n* issued after § 1610.5-5 was promulgated, the court in that case had no reason to take up § 1610.5-5, because the NEPA and FLPMA challenges raised in that action did not rest on any claim that BLM's actions contradicted an earlier land use plan. The plaintiffs in that case simply did not assert that the § 8341.2(a) driven closures violated the 43 U.S.C. § 1732(a) RMP conformance requirement. Thus *Am. Sand Ass'n* did not adjudicate the relationship between § 8341.2(a) and § 1610.5-5.[9]

The forgoing line of cases cited in support of the

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[9]Moreover, just because 43 C.F.R. § 8341.2(a) authorizes BLM to immediately close trails and areas to certain vehicles "[n]otwithstanding the consultation provisions in § 8342.2(a)," it does not follow that § 8341.2(a) obviates those consultation provisions. The regulation could have provided that the consultation provisions in § 8342.2(a) *"do not apply"* when BLM performs a § 8341.2(a) closure." But it does not. It merely provides that "notwithstanding" those § 8342.2(a) provisions, which still apply, BLM may perform an immediate closure under § 8341.2(a) and then get on with the consultation required under § 8342.2(a).

Tenth Circuit's conclusion that the Grand and Box Elder orders did not amount to plan amendments, are not helpful in that they do not review a claim that BLM violated FLPMA for failure to amend a prior plan in the face of § 1610.5-5's requirement to do so. Moreover, the Tenth Circuit's "this is not a defacto amendment" conclusion is just as circular and unavailing under the force of § 1610.5-5, as were BLM's unsuccessful "maintenance" and "policy continuation" arguments in *Klamath Siskiyou*, 468 F. 3d at 556, 560. Unlike the actions reviewed in those cases, the Grand and Box Elder orders substantially changed the scope, terms, conditions and decision of already approved RMPs, thus triggering the plan amendment mandate of § 1610.5-5 and this Court's related holding in *Norton*.

5. The Need for Seasonable Jurisprudential Relief

With no relevant statutory or case authority to support it, the Tenth Circuit has somehow constructed a false dichotomy that leaves room for *either* undue degradation prevention *or* RMP compliance and amendment, but not both. No authority, to UAC's knowledge, relieves BLM of the foregoing procedural duties under FLPMA and NEPA in the name of undue degradation prevention. Admittedly, UAC is also unaware of any authority that does the converse. The point is BLM simply must perform both, and this Court should pierce the Tenth Circuit's false dichotomy and put RMP's back on solid footing before BLM goes too far down the road of *ad hoc* undue degradation management. That way the counties may work efficiently through the present nationwide RMP revision season without having to despair over whether their end product will have any reasonably lasting effect.

These and other good reasons exist for this Court to grant a writ of certiorari and construe FLPMA to require BLM to institute a plan amendment process whenever undue degradation concerns prompt BLM to want to issue a summary management order or policy directive that contradicts an RMP. In a non-emergency situation, that plan amendment process should happen first. In the case of an emergency, that process should immediately follow on the heels of the contradicting order. Either way, FLPMA retains its integrity, and all public lands stakeholders from the OHV enthusiast to the wilderness afficionado, are benefitted through the public participation process. Otherwise, today's RMP-violating OHV closure order may become tomorrow's RMP-violating OHV expansion order. Principle and law must transcend the spectrum of interests when it comes to upholding and preserving FLPMA's core RMP conformance and RMP plan amendment mandates.

CONCLUSION

For these reasons, *amicus curiae* Utah Association of Counties respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted.

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UAC 1a

http://www.blm.gov/wo/st/en/prog/planning.print.html
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Planning U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
National Land Use Planning

To ensure the best balance of uses and resource protections for America's public lands, the BLM undertakes extensive land use planning through a collaborative approach with local, State and Tribal governments; the public; stakeholder groups. The result is a set of land use plans - called Resource Management Plans - that provide the framework to guide decisions for every action and approved use on the Nation's 258 million acres of surface lands and 700 million acres of mineral estate. Ensuring these plans are up-to-date is critical because so many Americans look to the public lands for a wide variety of resources, including energy, rights-of-way that support communications and energy delivery, a variety of recreational uses, and crucial habitat for species associated with the Western landscape, such as the sage grouse & pronghorn antelope.

In 2001, the BLM initiated an effort to evaluate and amend or revise its existing land use plans (many of which were more than 20 years old) in response to changing conditions and demands on the public lands. This included the preparation of new plans for designated units of the National Landscape Conservation System (NLCS). To-date, the BLM has completed 41 Resource Management Plans or plan

amendments, including 16 of 21 plans deemed time sensitive plans. Currently, more than 50 planning efforts are in various stages of completion. The BLM expects to complete more than 40 additional amendments, revisions, and new plans in the next 2 years.

The BLM became the first Federal agency to establish a consistent, permanent role for cooperating agencies by issuing a final Cooperating Agency Rule in April 2005. These planning regulations ensure the agency fully engages at all levels, including State, Tribal, and local governments, as well as other Federal agencies. The Cooperating Agency Rule supports the National Environmental Policy Act of 1969 (NEPA), which called on Federal, State and local governments to cooperate with the goal of achieving "productive harmony" between humans and their environment.

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